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For participants only

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Seventieth session (second part)

Provisional summary record of the 3442nd meeting

Held at the Palais des Nations, Geneva, on Thursday, 2 August 2018, at 3 p.m.

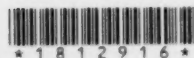
Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (continued)

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Present:

<i>Chair:</i>	Mr. Valencia-Ospina
<i>Members:</i>	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Gómez-Robledo
	Mr. Grossman Guiloff
	Mr. Hassouna
	Mr. Hmoud
	Mr. Huang
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Reinisch
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session (continued)

Chapter V. Identification of customary international law (continued) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V contained in document A/CN.4/L.918/Add.1.

Commentary to draft conclusion 6 (Forms of practice)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Tladi proposed that, in the second sentence, the second occurrence of the word "may" should be replaced with "does", as an act would count as practice once it had been identified as verbal conduct.

Mr. Murphy said that, in various parts of the project, a distinction was drawn between *opinio juris* and practice in relation to what States "said". For that reason, he was not sure that it could be said that verbal conduct counted as practice in all instances.

Mr. Nolte said that he tended to agree with Mr. Murphy. Verbal conduct counted as practice in the sense of customary international law in some instances, but not in all. It would therefore be more prudent to retain the original text.

Mr. Tladi said that he did not share Mr. Nolte's view. It would be interesting to learn of an example of an identified instance of verbal conduct that did not count as practice. Verbal conduct did not contribute to the formation of customary international law in all instances, but nor did other forms of practice.

Mr. Rajput said that the original text was the most appropriate. The use of the word "may" made clear that the Commission was not providing a definitive list of what counted as practice.

Mr. Saboia said that he could see the merit of Mr. Tladi's proposal. The last sentence of the paragraph stated that practice could at times consist entirely of verbal acts.

Mr. Hmoud proposed that, as a solution, the word "also" should be inserted after the second occurrence of the word "may".

Mr. Grossman Guiloff said that he found the distinction drawn in the paragraph between what States "did" and what they "said" problematic. It was not clear on what basis that distinction rested. What a State "did" and what it "said" could both surely count as practice. In that connection, he recalled the important role of unilateral statements of States in the formation of international norms.

Mr. Nolte said that he was prepared to go along with Mr. Hmoud's proposal. With regard to Mr. Grossman Guiloff's point, it could indeed be argued that "doing" and "saying" existed on a single continuum, and the theory of "speech acts" involved the collapse of the distinction between the two. It nevertheless remained necessary in the context of the topic to distinguish between serious speech acts and non-serious speech acts and, for that reason, he was in favour of retaining the word "may".

Mr. Grossman Guiloff said that the existence of the relevant *opinio juris* would determine whether a particular instance of verbal conduct counted as practice. Non-serious speech would not usually reflect an *opinio juris*. In his view, there was no legal or theoretical basis for such a tentative approach towards verbal conduct. He would not labour the point, but he nevertheless wished it to be noted that, in his view, written verbal conduct was itself a form of "doing". In any case, the original text had been carefully formulated.

Mr. Tladi said that his proposal to replace the word "may" with "does" would not create the impression that the Commission was providing a definitive list of what counted as practice. Mr. Nolte's comments confirmed to him that the Commission was in effect establishing a hierarchy among the various forms of conduct. Mr. Hmoud's proposal did not address his concerns.

Sir Michael Wood (Special Rapporteur) said that draft conclusion 6 was part of the section on general practice and not that on *opinio juris*. It was a response to old theories according to which only physical acts counted as practice. The Commission was asserting that verbal acts could also constitute practice. However, it was not the case that all statements counted as practice for the purposes of identifying customary international law. For that reason, he would support Mr. Hmoud's proposal.

Mr. Grossman Guiloff said that it was also the case that not everything that a State "did" counted as practice.

Paragraph (2), as amended by Mr. Hmoud, was adopted.

Paragraph (3)

Mr. Nolte, referring to the first part of the second sentence, said that it would be more appropriate to use the word "conscious" than "deliberate", as it would set a lower threshold for proving the existence of a particular rule of customary international law. In order to avoid a lengthy debate on the issue and in the interest of finding a compromise solution agreeable to all members, he proposed that the Commission should use the two words interchangeably and should insert the word "conscious", in brackets, immediately after the first occurrence of the word "deliberate". Both words were already used in the part of the sentence that followed the colon. He recalled that the Commission had decided not to use the word "deliberate" in the text of the draft conclusion itself.

Mr. Rajput said that an explanation of the Commission's interpretation of the word "deliberate" was given in the text that followed the colon in the second sentence.

Mr. Saboia said that he supported Mr. Nolte's proposal, which represented a good compromise. He had already commented on the word "deliberate" in his statement in the plenary.

Mr. Tladi said that he agreed with Mr. Rajput. He had a different recollection of the debate in the plenary and the discussion in the Drafting Committee. He seemed to recall that most Commission members had expressed a clear preference for the word "deliberate". In addition, as had been discussed in the Working Group on working methods, it was important that the Commission paid special attention to the views of States. In their written submissions on the topic, States had given a clear indication that the Commission should express the idea that an action had to be deliberate in order to count as practice. For that reason, he supported the original text.

Mr. Reinisch said that he supported Mr. Nolte's compromise proposal. There had been considerable debate in the Commission regarding the use of the word "deliberate". He seemed to recall that the decision not to use that word had itself been a deliberate and not merely a conscious one.

Mr. Park said that, as far as he recalled, some States had insisted that the word "deliberate" should be inserted before the word "abstention". The question of how to determine whether a particular instance of abstention was deliberate had been considered in the plenary and in the Drafting Committee. In his view, Mr. Nolte's proposal would create confusion.

Mr. Murphy said that the Commission had discussed the word "deliberate" in some detail. The inclusion of that word served to make the important point that not all instances of abstention from acting counted as practice. He was not persuaded by Mr. Nolte's point regarding proof. Whether the Commission used the word "deliberate" or the word "conscious", it would still be making clear that there was a certain threshold that had to be met in that regard. In addition, if Mr. Nolte's proposal hinged on a distinction between

those two words, he could not see the purpose of presenting them as synonymous. In his view, the original text made the Commission's position clear.

Ms. Oral said that there was little difference in meaning between the words "deliberate" and "conscious". In addition, they had both already been used in the paragraph. She would be in favour of retaining the original text.

Mr. Rajput said that Mr. Park's comment echoed the 2018 statement of the Chair of the Drafting Committee. Indeed, the text that appeared after the colon in the second sentence reflected the language used in the statement of the Chair of the Drafting Committee. In his view, the original text of the paragraph should be retained.

Sir Michael Wood (Special Rapporteur) said that, for the reasons given by other Commission members, his preference would be to retain the original text.

Paragraph (3) was adopted.

Paragraphs (4) and (5)

Paragraphs (4) and (5) were adopted.

Paragraph (6)

Mr. Tladi proposed that the language in the second half of the first sentence should be strengthened through the replacement of the words "are unlikely to be considered relevant" with "are not to be taken into account".

Sir Michael Wood (Special Rapporteur) said that, although he was prepared to accept a proposal to strengthen the language used in the first sentence, the formulation proposed by Mr. Tladi was too absolute in nature. To use the example of England, if a decision of the High Court had been overruled by a decision of the Court of Appeal and that second decision had in turn been overruled by a decision of the Supreme Court, it was possible that the original decision of the High Court would continue to be relevant. As a less absolute alternative, he proposed that the words "are unlikely to be considered relevant" should be replaced with "are generally not considered relevant".

Mr. Nolte said that another solution would be to insert the word "very" before "unlikely".

Mr. Tladi said that he preferred the language proposed by the Special Rapporteur.

Paragraph (6), as amended by the Special Rapporteur, was adopted.

Paragraphs (7) and (8)

Paragraphs (7) and (8) were adopted.

The commentary to draft conclusion 6 as a whole, as amended, was adopted.

Commentary to draft conclusion 7 (Assessing a State's practice)

Paragraphs (1) to (3)

Paragraphs (1) to (3) were adopted.

Paragraph (4)

Sir Michael Wood (Special Rapporteur) proposed that the words "the 'general practice' element" should be replaced with "'a general practice'".

Paragraph (4), as amended, was adopted.

Paragraph (5)

Sir Michael Wood (Special Rapporteur) proposed that, in the third sentence, the words "In this vein, for example" should be replaced with "Thus".

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 7 as a whole, as amended, was adopted.

Commentary to draft conclusion 8 (The practice must be general)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park said that the meaning of the word "timing" in the second sentence of footnote 51 was unclear; he wondered whether replacing it with the word "duration" might clarify the meaning.

Sir Michael Wood (Special Rapporteur) said that the second sentence had not been intended to refer to the duration of the practice but rather to the moment in time when the inconsistent practice had occurred. In order to make that clear, he proposed amending the sentence so that it would read: "It might also be relevant to consider when the inconsistent practice occurred, in particular whether it lay in the past, after which consistency prevailed."

Mr. Murphy proposed that, in the second sentence of the paragraph, the word "large" should be replaced with the word "widespread", so as to mirror the wording of the draft conclusion.

Ms. Lehto said that the word "large" in that sentence referred to the number of States, which could not be qualified as "widespread".

Mr. Murphy, recognizing the problem pointed out by Ms. Lehto, suggested the deletion of the words "followed by a" and "number of States" in the second sentence, so that the sentence would read: "First, the practice must be sufficiently widespread and representative." Those deletions would require an amendment to the third sentence, namely replacing the words "such instances" with the words "the practice", which would also mirror the wording of the draft conclusion.

Paragraph (2), as amended by the Special Rapporteur and Mr. Murphy, was adopted.

Paragraph (3)

Mr. Murphy said that the example of "international canals" in the second sentence had been included to illustrate a kind of practice that might not be widespread, since not all States used international canals. Implicit in that example was the idea that customary international law governed interoceanic canals, such as the Suez, the Panama and the Kiel canals, although that idea might not coincide with the way the canal States viewed the regimes applicable to them. If the word "straits" was used in place of the word "canals", it might illustrate the point the Commission wished to make in a manner that was more pertinent to the topic. Such an amendment would require deleting the clause "of which there are very few", since there were many international straits.

Sir Michael Wood (Special Rapporteur) said that, although the example of international canals was a good one, he could see that it might imply that passage through such canals was governed by customary international law, which was probably not the case. He did not object to replacing the word "canals" with the word "straits" or deleting the phrase "of which there are very few". He proposed that, at the end of the sentence, the words "would necessarily be" should be replaced with the words "may well be", in order to more closely fit that example.

Mr. Saboia said that, although Mr. Murphy's proposal to replace "canals" with "straits" was apparently based on the fact that international canals were governed by treaties, there was nothing to prevent the application of customary international law to States that were not parties to those treaties but that were involved in some way with the practice concerned. He consequently saw no reason to delete the word "canals" and proposed, in fact, that the sentence should refer to both canals and straits.

Ms. Oral asked whether the reference to "international canals" in the second sentence referred only to the practice of coastal States or also to the practice of the users of international straits or canals. If it referred to the latter, then it involved the practice of a greater number of States.

Mr. Nolte said that it had always been his understanding that the international status of canals was established by treaties among a certain limited number of States but that those treaties sometimes contained a clause stating that the canal in question should be open for use by the ships of all other States. Other States that used such canals therefore did so on the basis of a right conferred on them by treaty, not under rules of customary international law. He consequently shared Mr. Murphy's concern about not giving the impression in paragraph (3) that international canals operated on the basis of customary international law.

Sir Michael Wood (Special Rapporteur) said that he recognized the difficulty posed by the reference to "international canals" and could see potential difficulties with "international straits" as well. Perhaps it would be best not to provide any example at all in that instance. He proposed to reformulate the second sentence to read: "As regards diplomatic relations, for example, in which all States regularly engage, a practice may have to be widely exhibited, while with respect to some other matters, the amount of practice may well be less."

Paragraph (3), as amended by the Special Rapporteur, was adopted.

Paragraph (4)

Mr. Tladi said he wished to propose a number of amendments about which he felt particularly strongly. The first proposal was the deletion of the phrase "and major shipping States" in the second sentence. The second proposal was to move the final sentence of footnote 54 to the end of paragraph (4), since all the Commission members who had spoken in plenary meetings in favour of the insertion of a reference to the doctrine of "specially affected States" had agreed that it had nothing to do with a State's power. That being the case, it should be reflected in the text, not hidden in a footnote. His third proposal was to add the words "It should be made clear, however, that" to the beginning of that new sentence so that it would read: "It should be made clear, however, that the term 'specially affected States' should not be taken to refer to the relative power of States."

Mr. Hmoud said that he supported Mr. Tladi's proposal and agreed that the basis for recognizing the status of "specially affected States" was not the power of States.

Mr. Park said that he supported Mr. Tladi's proposal to delete the phrase "major shipping States". However, in the last sentence of footnote 54, he had some doubts about the meaning of the words "relative power of States" since it was unclear what kind of power was meant. If there was no consensus among Commission members as to the meaning of the word "power" in that sentence, he would be opposed to moving it to the end of paragraph (4).

Mr. Nolte suggested that the insertion of the words "as such" between the words "not" and "be" in the final last sentence of footnote 54 might reconcile the views expressed by Mr. Park and Mr. Tladi. It would also clarify that the doctrine of "specially affected States" had nothing to do with power, while nevertheless indicating that it could not be excluded that, in specific cases, States possessing varying degrees of power might have the status of "specially affected States". With regard to Mr. Tladi's proposal to delete the phrase "and major shipping States", he wondered whether it might be sufficient to delete only the word "major".

Mr. Murphy said that he would like to know the reason for Mr. Tladi's suggestion to delete the phrase "and major shipping States". In principle, he had no objection to moving the last sentence of footnote 54 up to the text of paragraph (4), since its position was merely a question of emphasis. He would also like to know the reason for Mr. Tladi's proposal to insert the words "It should be made clear, however, that" at the beginning of the sentence, as opposed to transposing the sentence as it currently stood. As to Mr. Nolte's proposal to insert the words "as such", he was uncertain that it would address Mr. Park's concern. In his view, the purpose of that sentence was to indicate that the doctrine of

"specially affected States" meant that the practice of certain States in certain situations was of greater relevance than that of others, which had nothing to do with the relative power of States.

Mr. Reinisch said that there was merit to moving the last sentence of footnote 54 to paragraph (4). There was also merit to inserting the words "as such" in the sentence, since, although there could be situations in which a State's power was one of the reasons for considering it to be a "specially affected State", the Commission was attempting to indicate that, in other situations, it was a totally irrelevant criterion.

He, too, did not understand the reason for Mr. Tladi's proposal to delete the phrase "and major shipping States", as it seemed that both sets of examples given in the second sentence were perfectly acceptable.

Mr. Tladi said that it had been clear from the Commission members' statements delivered in plenary that the doctrine of "specially affected States" had nothing to do with power. The insertion of the words "as such" would reverse that position, giving the impression that the International Law Commission had not completely excluded the possibility that a State's power might give it the status of a "specially affected State". Even if the factors that qualified a State as "specially affected" flowed from its power, it was those factors that afforded it that status, not its power.

In response to Mr. Murphy's questions, the reason for his proposal to insert additional text at the beginning of the final sentence of footnote 54 was to emphasize that the Commission did not align itself with the mistaken view that the criterion for determining whether a State was "specially affected" was its relative power. And he had proposed the deletion of the words "and major shipping States" from the second sentence because he wished to make a broader point about the examples provided in paragraph (4), which was that, although the States referred to in those examples could be considered "specially affected States", other States could also be considered "specially affected", only affected in a different way. He was not opposed to finding another example to replace that of "major shipping States".

Mr. Saboia said that he shared many of the concerns expressed by Mr. Tladi and had expressed them in his statement in plenary meetings of the Commission and also in the Drafting Committee. He found it unacceptable that States that were unable to participate in the activity or practice that served as a basis for identifying a rule of customary international law for reasons relating to such factors as their geography or their lack of technology tended to be placed at the opposite extreme of States that had participated directly in it, even though they might have expressed opinions or taken part in discussions about regulating the activity in question. In his statement, he had cited as examples issues relating to outer space and the treaties that regulated activities there, which were very much of concern to all States. The same could be said of issues relating to the use of force. The Commission thus had to be careful to avoid any implication that the practice of States that had not been directly involved in the relevant activity was to be marginalized. Mr. Tladi had raised an important point, and the Commission should attempt to find a satisfactory solution for it in paragraph (4).

Mr. Rajput said that he agreed with most of what Mr. Tladi had said. With regard to the reference to "major shipping States" in paragraph (4), if a State was involved in shipping, then it was its practice that mattered, irrespective of whether it was a major or minor shipping State. By attempting to emphasize the role of major shipping States, the Commission was tipping the balance in a certain direction. The best way to deal with the situation would be to drop the reference to "major shipping States" altogether, as Mr. Tladi had proposed, or else simply to delete the word "major".

He supported Mr. Tladi's proposal to move the last sentence of footnote 54 up to the text of the commentary with the additional wording at the beginning of the sentence. With regard to Mr. Park's comment concerning the expression "relative power", the point that was intended to be captured was precisely that power could take various forms, and the Commission wanted to make it very clear that, irrespective of the form of power a State possessed, the relative strength of a State was inconsequential when it came to the concept of "specially affected States".

Ms. Oral said that she was not entirely opposed to the inclusion of the words "major shipping States" since the International Maritime Organization (IMO) used shipping tonnage as a basis for its practice, thus taking major shipping States into account differently from others. She was concerned that the use of the expression "shipping States" without the word "major" might have the effect of including the practice of States engaged in substandard shipping. The Commission should be cautious when getting into the area of shipping in general.

One example that raised questions about the operation of the doctrine of "specially affected States" was that of a State conducting military activities in an exclusive economic zone. It was difficult to know, in that example, whether the "specially affected State" was the coastal State or the State conducting the military activities, and the respective views of such States were probably quite different. That was an example in which the question of power could be relevant. That said, she still had a problem with the doctrine of "specially affected States", as she had indicated in her statement on the subject, given that the Commission was extrapolating to very broad areas on the basis of one case that referred to that concept.

Mr. Murphy said that he could endorse Mr. Tladi's proposal to move the final sentence of footnote 54 to the text of paragraph (4), and he could go along with the additional wording he had proposed at the beginning of that sentence, even though he did not see the importance of it. There was a technical problem, however, with deleting the words "and major shipping States" from the second sentence of paragraph (4), as the sentence contained a reference to maritime zones, which included the high seas. It was not obvious why coastal States would be relevant in that context, and the Commission would have to find a solution if those words were deleted. He suggested that the phrase "flag States" might work as a replacement for "shipping States". The top ten flag States were not the powerful States, and the use of that example would point to a scenario in which the practice of a group of States clearly needed to be taken into account in the area of navigation on the high seas.

Mr. Park said that he was unhappy with the term "flag State", owing to the use of flags of convenience. He therefore agreed with Ms. Oral.

Ms. Oral said that some of the top ten flag States might not offer examples of best practice. For that reason, the expression "major shipping States" would be preferable.

Mr. Nolte said that one of the purposes of the commentaries was to supply illustrative examples. In order to obviate any suggestion of power relations, it might be advisable to replace "major shipping States" with "relevant shipping States", in other words shipping States of relevance to the rule.

Mr. Rajput agreed with Mr. Murphy that the paragraph could not refer only to the practice of coastal States. However, the term "flag State" created a huge problem owing to the registration of vessels under flags of convenience. One solution might lie in simply dropping the adjective "major".

Ms. Escobar Hernández said that she was not in favour of replacing the phrase "major shipping States" with "flag States" on account of the use of flags of convenience and the reluctance of international courts to give a ruling on that institution which in practice gave rise to many problems.

Mr. Park proposed the deletion of the words "major shipping States" and the redrafting of that part of the sentence to read "coastal States, including archipelagic States".

Mr. Tladi said that Mr. Park's proposal would not work in the context in question. It might be better to speak of "relevant coastal States and flag States".

The Chair said that he had noted some opposition to the term "flag State".

Mr. Ruda Santolaria said that he would prefer to retain the notion of "shipping States".

Mr. Rajput said that he could not agree to either the expression "archipelagic State", because it was too narrow, or the term "flag State", because it posed a host of problems. It

would therefore be wise to keep to generic terms such as "shipping States" or "navigating States".

Mr. Nguyen said that, in view of IMO standards, a reference should be made to tonnage.

Mr. Ouazzani Chahdi said that the term "flag State" necessarily encompassed States offering flags of convenience and, for that reason, the original expression "major shipping States" should be retained.

Mr. Šturma said that what was important was that a sentence from the footnote had been moved to the main text of the paragraph. Perhaps it would be apt to delete the word "major" and insert the word "relevant" in the final sentence, which would then read "practice of the relevant coastal States and shipping States".

Ms. Oral said that shipping, which was highly regulated by IMO, might not be the best example of practice in the context of customary international law. Mr. Murphy was right that the usual term was "flag State" but talking about flag States without any reference to IMO standards might raise complex issues which went beyond the scope of the commentary.

Mr. Murphy said that in fact what the Commission was trying to do was to capture a well-balanced rule relating to navigation in maritime zones. He was therefore in favour of the phrase "practice of the relevant coastal and flag States", as there was nothing sinister about the concept of a flag State and the term "shipping State" did not appear anywhere in the United Nations Convention on the Law of the Sea.

Sir Michael Wood (Special Rapporteur) said that he agreed with the language suggested by Mr. Tladi, as "flag State" was the term used throughout the United Nations Convention on the Law of the Sea.

The Chair, speaking as a member of the Commission, said that the Commission should indeed abide by the terminology of the United Nations Convention on the Law of the Sea.

Mr. Rajput said that the term "flag State" had too many implications that went beyond navigation in a maritime zone.

The Chair invited the Special Rapporteur to express his opinion.

Sir Michael Wood (Special Rapporteur) said that the adjective "relevant" qualified both coastal States and flag States. The reference was therefore clear and was good legal language taken from the United Nations Convention on the Law of the Sea.

Paragraph (4), as amended by Mr. Tladi, was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Mr. Murphy said that, in the second sentence, "and/or" should simply read "or".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Paragraph (9) was adopted.

The commentary to draft conclusion 8 as a whole, as amended, was adopted.

Part Four (Accepted as law (opinio juris))

The chapeau to Part Four was adopted.

*Commentary to conclusion 9 (Requirement of acceptance as law (opinio juris))**Paragraphs (1) to (6)**Paragraphs (1) to (6) were adopted**The commentary to conclusion 9 as a whole, was adopted**Commentary to conclusion 10 (Forms of evidence of acceptance as law (opinio juris))**Paragraphs (1) to (3)**Paragraphs (1) to (3) were adopted**Paragraph (4)*

Mr. Park said that the meaning of the sentence beginning with the words "Similarly, the effect of practice ...", was unclear and that the sentence should therefore be deleted.

Sir Michael Wood (Special Rapporteur) said that the sentence made the simple proposition that, if a statement were made to the effect that a practice which was seemingly in line with an emerging or alleged rule was not in fact in accordance with that rule, that statement nullified the effect of the practice. The example given in footnote 72 provided all the necessary clarification.

Mr. Nolte said that he agreed with the Special Rapporteur. The sentence was useful. Perhaps the explanation could be expanded by adding at the end of the sentence the words "or that the practice is not pursuant to the alleged rule". Sometimes a State which made an *ex gratia* payment, for example, did not do so pursuant to a particular rule.

Mr. Tladi said that he was in favour of retaining the sentence.

Mr. Ruda Santolaria said that he too supported retaining the sentence in question.

Paragraph (4) was adopted.

Paragraphs (5) to (7)

Paragraphs (5) to (7) were adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) said that, in light of a discussion which he had had with Mr. Nolte, he suggested that, in the last sentence, the phrase "its perceived silence" should be changed to "its inaction".

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 10 as a whole, was adopted.

*Part Five (Significance of certain materials for the identification of customary international law)**Commentary*

Sir Michael Wood suggested the deletion of the word "commentary" in line with the practice followed elsewhere in the draft text.

It was so decided.

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Park, supported by **Mr. Saboia**, said that, in the last sentence, it would be advisable to delete the phrase "the extent to which the Commission is engaged in

progressive development of the law", because it created the wrong impression that there was a hierarchy in the Commission's work of codifying and progressively developing international law. During the late 1950s, when the Commission had been dealing with the law of the sea, it had abandoned the distinction between codification and progressive development. The phrase in question was reintroducing it. Whether the Commission's output constituted codification or progressive development was a very complex issue often involving a large amount of subjective judgment. Moreover, the evolutive nature of international law meant that, in some cases, work which had once represented progressive development of international law had ultimately become codification.

Mr. Nolte said that the Commission could not abolish the distinction between codification and progressive development of international law with the stroke of a pen even if, in the past, when the Commission had been drafting certain treaties, it had not considered it necessary to specify whether or not their contents reflected existing customary international law. The whole purpose of the identification of customary international law was to determine what was or was not law. Given that in 2017 the overwhelming majority of States represented in the Sixth Committee had insisted on drawing that very distinction in the debate on the topic of immunity of State officials from foreign jurisdiction, it would be fundamentally wrong to undermine that distinction in the paragraph under consideration. The sentence at issue was therefore appropriate and should be retained, otherwise the Commission would give the erroneous impression that it considered that the distinction between progressive development and codification was irrelevant and could be disregarded.

Mr. Rajput said that the reference to progressive development was extremely important and should therefore be maintained. It did not in any way interfere with the Commission's methodology and clearly indicated that, when there was a dearth of practice, the Commission's work did not constitute codification of something which could be termed customary international law. In that connection, he recalled the definition of progressive development contained in article 15 of the statute of the International Law Commission.

Mr. Tladi said that while the distinction between codification and progressive development was important, and progressive development should not be viewed as the lesser of the two, he opposed the idea of referring specifically to either in the output of the Commission's work. Mr. Rajput's point was valid, but the key indicator as to whether the Commission was engaged in codification or progressive development should be the sources upon which it relied in a given case. He therefore supported Mr. Park's suggestion to delete the phrase in question, albeit for slightly different reasons.

Mr. Murphy said that the issue went deeper than the sources that the Commission used in its work. On occasion, such as in drafting the 2011 articles on the responsibility of international organizations, it had had cause to indicate that it was engaged in progressive development, even if not explicitly. The key element of the phrase under discussion was the words "the extent to which". The credibility and legitimacy of the Commission turned on the degree to which it was conscious of engaging in progressive development and how it ensured transparency in that regard. Consequently, he favoured retaining the phrase.

Mr. Vázquez-Bermúdez echoed calls for the phrase to be deleted. The Commission's work was generally a mixture of codification and progressive development; its authority depended greatly on the sources it used and the extent of its research, but States' reception of its output ultimately served as the best test.

Mr. Nolte said that it could be difficult for those identifying norms of customary international law to judge the Commission's output on the basis of how it was received by States, the pronouncements of which were not always clear. As a compromise, he suggested altering the phrase to read "the extent to which the Commission is engaged in proposing new law".

Mr. Park said that he could not accept that suggestion: it was not the Commission's mandate to propose new law. The subjective nature of the phrase under discussion was of particular concern given that, in many cases, it would be domestic judges relatively unfamiliar with international law and the work of the Commission who would find themselves attempting to decide whether the Commission had been engaged in codification or progressive development on a particular topic.

Ms. Lehto said that the phrase was being read in the broader context of the discussion concerning the Commission's mandate and whether it should indicate that it was engaged in codification or progressive development in any given instance. Although the phrase was not without purpose in respect of the identification of customary international law, it was tautological and unnecessary, giving rise to more misunderstandings than it clarified, and should be deleted.

Ms. Escobar Hernández, agreeing that that phrase created more problems than it solved and should be deleted, said that mentioning only one of the two equal elements of the Commission's mandate would require the Commission to embark on a prolonged debate as to the nature of that mandate, which was neither procedurally desirable nor opportune. The phrase might suggest to the outside reader that the Commission considered progressive development subsidiary to and less important than codification, which was surely not the Special Rapporteur's intention; moreover, the reference earlier in the paragraph to the sources relied upon by the Commission already served to clarify what weight should be given to the output of the Commission's work.

Mr. Cissé said that, as the phrase was logical and merely reflected the Commission's mandate, it could safely be retained. The debate should not be further prolonged.

Mr. Ruda Santolaria, echoing calls for the debate to be curtailed, said that the phrase could be deleted as the paragraph would be clear without it.

Mr. Murphy, observing that any reference to progressive development seemed problematic, suggested instead that the phrase be altered to read "the way in which the Commission characterizes its work". In some cases, the Commission stated explicitly that it was dealing with customary international law, which was an important factor in identifying such norms.

The Chair recalled that the Commission had yet to take a general decision on characterizing the output of its work as the result of codification or of progressive development. When preparing the draft articles that had become the 1969 Vienna Convention on the Law of Treaties, for example, no such characterization had been used.

Mr. Grossman Guiloff, acknowledging the importance of the points that Mr. Murphy had raised, said that they merited a dedicated, in-depth discussion at a future session of the Commission, the outcome of which should not be prejudged.

Mr. Saboia said that the Commission should avoid labelling its work and its output. During the drafting process, it was not always clear what form that output would eventually assume; even once adopted, commentators were sometimes hesitant to describe it as the result of a codification exercise.

Mr. Vázquez-Bermúdez said that, as the paragraph already made it clear that not all determinations of the Commission carried the same weight, there was no need for a specific reference to progressive development.

Mr. Nolte said that the discussion need not be prolonged if the Commission were to proceed on the understanding that deleting the disputed phrase would in no way prejudice any future debate on whether it should explicitly characterize its work and output as codification or progressive development, particularly in cases where States sought its views on whether a norm was one of customary international law. If that were the case, he could agree to the deletion of the phrase.

Mr. Petrič, welcoming Mr. Nolte's suggested course of action, said that codification and progressive development were intertwined in the work of the Commission, although exactly how they were combined would differ from topic to topic. The Commission had traditionally been reluctant to state whether it was engaged in codification or progressive development, but if States wished to know whether a particular provision reflected customary international law and a clear answer could be given, the Commission should give it.

The Chair said that an in-depth debate on the issue would be needed in due course; without prejudice to that debate, the Commission could proceed as suggested, particularly

given that the list in the last sentence of the paragraph was introduced by the word "including", making it non-exhaustive.

Sir Michael Wood (Special Rapporteur), expressing surprise at the direction the discussion had taken, said that it had not been his intention to stimulate a debate on fundamental issues relating to the Commission's work. While it seemed to him obvious that knowing whether the Commission had been engaged in progressive development or codification was the starting point for making use of its determinations in identifying rules of customary international law, that point emerged clearly from the rest of the paragraph. He therefore had no objection to deleting the phrase in question.

The Chair said that he took it that the Commission agreed to delete the words "the extent to which the Commission is engaged in progressive development of the law" from the last sentence of paragraph (2).

Paragraph (2), as amended, was adopted.

The commentary to draft conclusion 10 as a whole, as amended was adopted.

Commentary to draft conclusion 11 (Treaties)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Tladi suggested that the words "correspond to", in the first sentence, should be replaced with "reflect".

Mr. Nolte said that the words "may also be of relevance", in the last sentence, suggested that the attitude of States that were not party to a widely ratified treaty would not always be relevant in establishing whether the treaty reflected customary international law. Unless the Special Rapporteur could provide examples of when that might be the case, he would prefer the words "may also be" to be changed to "will also be".

Mr. Tladi said that examples could be found, however unlikely; nevertheless, he did not object to Mr. Nolte's suggestion, despite the fact that it appeared somewhat inconsistent with the Commission's earlier discussion.

Mr. Murphy expressed support for both the amendments suggested.

Sir Michael Wood (Special Rapporteur), echoing Mr. Tladi's comments, agreed to both the suggested amendments.

Mr. Grossman Guiloff, referring to the penultimate sentence of the paragraph, sought clarification of the connection between the mention of treaties adopted "without opposition" and the reference given in footnote 83, which concerned a treaty adopted by an overwhelming majority of States.

Sir Michael Wood (Special Rapporteur) said that mentioning both treaties adopted without opposition and treaties adopted by an overwhelming majority of States could be helpful to those who might come to apply the draft conclusions in practice. The adoption of a treaty without opposition was a significant factor in the identification of customary international law.

With that explanation, **the Chair** said that he took it that the Commission agreed to retain the words "without opposition" and to accept the two amendments previously suggested.

Paragraph (3), as amended, was adopted.

Paragraph (4)

Paragraph (4) was adopted.

The meeting rose at 6 p.m.

Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3443rd meeting

Held at the Palais des Nations, Geneva, on Friday, 3 August 2018, at 10 a.m.

Contents

Succession of States in respect of State responsibility (*continued*)

Interim report of the Drafting Committee

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (continued)

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Present:

Chair: Mr. Valencia-Ospina
Members: Mr. Argüello Gómez
Mr. Cissé
Ms. Escobar Hernández
Ms. Galvão Teles
Mr. Gómez-Robledo
Mr. Grossman Guilloff
Mr. Hassouna
Mr. Hmoud
Mr. Huang
Mr. Jalloh
Mr. Laraba
Ms. Lehto
Mr. Murase
Mr. Murphy
Mr. Nguyen
Mr. Nolte
Ms. Oral
Mr. Ouazzani Chahdi
Mr. Park
Mr. Peter
Mr. Petrič
Mr. Rajput
Mr. Reinisch
Mr. Ruda Santolaria
Mr. Saboia
Mr. Šturma
Mr. Tladi
Mr. Vázquez-Bermúdez
Mr. Wako
Sir Michael Wood
Mr. Zagaynov

Secretariat:

Mr. Llewellyn Secretary to the Commission

The meeting was called to order at 10 05 a.m.

Succession of States in respect of State responsibility (agenda item 10) (*continued*)

Interim report of the Drafting Committee (ILC(LXX)/DC/SOSR/CRP.2)

Mr. Jalloh (Chair of the Drafting Committee), introducing the interim report of the Drafting Committee on the topic "Succession of States in respect of State responsibility", said that following the referral to it of draft articles 5 to 11, the Drafting Committee had held three meetings from 24 to 26 July 2018. He recalled that, at the Commission's sixty-ninth session, the Drafting Committee had provisionally adopted draft articles 1 and 2 and that draft articles 3 and 4 had been left in abeyance to be considered by the Committee at a later stage. He further recalled that, at the current session, when draft articles 3 and 4 would ordinarily have been considered, the Drafting Committee had not taken them up, at the request of the Special Rapporteur, who had explained in his second report (A/CN.4/719) that it would be more appropriate to return to those draft articles at an even later stage, and in any event after addressing the draft articles proposed in the second report. Accordingly, his statement constituted an interim report on the progress made thus far by the Drafting Committee.

Recalling that, during the Commission's debate in plenary, several members had proposed that a provision should be added to make clear the subsidiary nature of the draft articles, he said that the Drafting Committee had, at the Special Rapporteur's suggestion, adopted a new paragraph 2 under draft article 1 (Scope), which had been provisionally adopted at the Commission's sixty-ninth session. The new paragraph read: "The present draft articles apply in the absence of any different solution agreed upon by the States concerned." The words "any different solution" were intended to capture the vast array of possible solutions that the parties might adopt in a situation of succession of States. The words "agreed upon" were to be understood broadly, and did not refer only to the consent to be bound by a treaty. The term "States concerned" could refer to the predecessor State or States, the successor State or States, as well as any State injured by an internationally wrongful act that had occurred before the date of succession.

Turning to draft article 5, entitled "Cases of succession of States covered by the present draft articles", he said that the text of the provision, whose purpose was to limit the present draft articles to succession of States in conformity with international law, was modelled on article 6 of the 1978 Vienna Convention on Succession of States in respect of Treaties and article 3 of the 1983 Vienna Convention on Succession of States in respect of State Property, Archives and Debts. A suggestion to delete the word "only" in the proposed draft article had generated significant discussion: in the view of the Drafting Committee, any deviation from the wording included in those two instruments could be misinterpreted as signalling an intention by the Commission to address the issue of legality of succession in a different manner in relation to the current topic than in relation to succession in respect of treaties or State property, archives and debts. A debate had then taken place on whether the rationale underlying the corresponding articles in the two Vienna Conventions on succession of States, respectively, also applied in the context of the current topic. Draft article 5 should not provide an advantage to unlawful successor States in relation to succession to responsibility. Ultimately, the Drafting Committee had provisionally adopted the draft article with no changes to the original formulation by the Special Rapporteur and it had been understood that the commentary would indicate that issues of State responsibility might indeed arise in complex situations where the legality of a succession was contested and that, in such situations, the general rules of international law on State responsibility would apply to unlawful successor States.

Turning to draft article 6, entitled "No effect upon attribution", he said that the draft article, which comprised just one paragraph, had been arrived at following an extensive debate within the Drafting Committee in relation to paragraph 1 of draft article 6 as proposed by the Special Rapporteur in his second report. The Drafting Committee had been of the view that, as originally drafted, draft article 6 (1) did not set forth a general rule applicable to the succession of States in respect of State responsibility, but rather addressed

the question of attribution, which several members of the Committee considered to be conceptually distinct from the general rule of non-succession. The Special Rapporteur had stated that it was preferable to set out a stand-alone provision concerning attribution before setting out the general rule of non-succession in a subsequent provision, and had made a proposal to that effect.

The purpose of draft article 6, then, was to indicate that rules of State responsibility did not cease to apply in situations of succession of States. It clarified that an internationally wrongful act that had occurred before the date of succession remained attributable to the State that had committed it. An extensive debate had taken place within the Drafting Committee on whether such a draft article was needed in the context of the current topic. According to a number of members, the draft article was unrelated to the current topic and unnecessarily reiterated a rule that was obvious. To the Special Rapporteur and a relatively small number of other members, on the other hand, retaining such a provision was important, because it constituted the logical premise of a number of subsequent proposed draft articles concerning aspects of State responsibility that were relevant in the context of State succession.

It had been stressed by several Drafting Committee members that the concept of attribution in draft article 6 might be conflated with the question of attribution of conduct addressed in article 2 (a) and chapter II of the articles on responsibility of States for internationally wrongful acts, which was only one of the two constitutive elements of an internationally wrongful act. In that regard, the Drafting Committee had opted for the formulation "attribution to a State of an internationally wrongful act committed by that State before the date of succession" precisely to emphasize that, in draft article 6, the term "attribution" must be understood in a broad sense, relating to the internationally wrongful act as a whole.

An alternative term for attribution, "imputation", had also been discussed, in view of the concern expressed by some members that the use of the term "attribution" might be confusing if it was not associated with the term "conduct" or if it was misread to mean something narrower than what had been intended by the Drafting Committee. For some members, rather than use the term "attribution", which had another meaning in the context of State responsibility, it might have been clearer to instead state that the obligations and rights arising from an internationally wrongful act committed before the date of the succession of States remained, in principle, with the predecessor State, which was the author of the wrongful act, since that was the crux of the matter.

After a thorough discussion, the Drafting Committee had provisionally adopted draft article 6 on the understanding that, taking into account the views expressed in the Drafting Committee, the draft article's wording and perhaps placement would be revisited before or during the completion of the first reading. That understanding was reflected in a footnote to the draft article. The Drafting Committee and the Special Rapporteur had also agreed that the latter would clearly explain the various concerns regarding the draft article in the commentary thereto.

He stressed that he had presented his interim report for information purposes only, as the Commission was not being requested to take action on the draft articles at the current stage. A complete text of the draft articles provisionally adopted thus far, along with the text of his interim report, would be posted on the Commission's website.

Noting that he was presenting his last report to the Commission as a whole in his capacity as Chair of the Drafting Committee, he said that the Drafting Committee had delivered some substantial outputs during the Commission's seventieth session, including the completion of the second reading of the outcome on two topics; the completion of the first reading of the outcome on two other topics; and completion of the consideration of new draft principles on the topic "Protection of the environment in relation to armed conflicts". It had also made progress on provisions concerning "Peremptory norms of general international law (*jus cogens*)" and "Succession of States in respect of State responsibility". He was pleased to further note that the Committee's texts concerning each of the topics had been provisionally adopted on the basis of consensus, despite the complex

issues involved and the strong views initially expressed by some members. He paid tribute to, *inter alia*, the Chair of the Commission for his capable leadership; the Drafting Committee members for their diligence and spirit of collegiality; the special rapporteurs, whose reports and contributions provided the foundation for the Commission's debates and subsequent work of the Drafting Committee; and the Secretariat for its crucial support.

The Chair said that he wished to express his thanks to the Chair of the Drafting Committee, whose performance had been exemplary not only in his mastery of very complex issues in a number of vastly different topics, but also in the even-handedness with which he had handled the members of the Drafting Committee, thus making it possible to find common ground and adopt by consensus all the texts referred to it by the Commission.

Mr. Rajput, referring to a proposal made by Mr. Nolte and supported by the Special Rapporteur on succession of States in respect of State responsibility, said that the Secretariat should be requested to conduct a study on that topic.

Mr. Tladi said that he would be interested in receiving more detailed information about the proposed study once a formal decision had been taken in regard thereto.

The Chair said that the parameters of such a study would be discussed by the Special Rapporteur with the Secretariat, which had already indicated its readiness to proceed with such a study if so requested. He took it, therefore, that the Commission wished to request the Secretariat to conduct a study on the succession of States in respect of State responsibility.

It was so decided.

Draft report of the Commission on the work of its seventieth session (continued)

Chapter V. Identification of customary international law (continued) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.918/Add.1.

Commentary to draft conclusion 11 (Treaties) (continued)

Paragraph (5)

Mr. Tladi said that, in the fifth sentence, the meaning of the phrase that followed the words "which carry greater weight" was unclear.

Sir Michael Wood (Special Rapporteur) said that the sentence meant that *opinio juris* carried more weight in cases where there were a large number of negotiating States than in cases where there were a small number of negotiating States. He suggested that deleting the phrase "in the identification of customary international law" might clarify the meaning.

Mr. Tladi said that he supported the deletion proposed by Sir Michael Wood.

Mr. Park proposed adding, in the fourth sentence, the phrase "(travaux préparatoires)" after the words "preparatory work", as the former was a familiar term to practitioners; moreover, there were other instances of French terms, such as "doctrine", in the commentary.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted.

Paragraph (7)

Mr. Murphy proposed that the second sentence of the paragraph might be redrafted, for the sake of clarity, to read: "Caution is merited when regarding whether such a process has occurred."

Sir Michael Wood (Special Rapporteur) said that he was not opposed to the proposed amendment, but would prefer a word such as "considering" rather than "regarding".

Mr. Nolte said that the second sentence as originally drafted had the merit of referring to the process of the generation of a new rule of customary international law and not immediately to the identifier of such a rule; it drew the attention of the identifier to the fact that the process was rare and difficult and not one that could be presumed to occur. That was not conveyed by the sentence proposed by Mr. Murphy. He would therefore prefer to leave the second sentence as it was.

Mr. Saboia said he agreed with Mr. Nolte. It was not appropriate to emphasize caution since the text of the International Court of Justice being cited in the commentary highlighted that the generation of a new rule of customary international law was a careful process, but not one that necessarily required caution.

Sir Michael Wood (Special Rapporteur) said that, having heard the statements made by Mr. Nolte and Mr. Saboia, he was now convinced that the original drafting of the sentence was the best one.

The Chair said he took it that the Commission wished to adopt paragraph (7) without any amendments.

Paragraph (7) was adopted.

Paragraph (8)

Sir Michael Wood (Special Rapporteur) said that, in the penultimate sentence of the paragraph, it was not clear to what the word "it", in the phrase "or in order to derogate from it", referred. He therefore suggested replacing the word "it" with the phrase "an existing but different rule".

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 11, as a whole, as amended, was adopted.

Commentary to draft conclusion 12 (Resolutions of international organizations and intergovernmental conferences)

Paragraph (1)

Mr. Rajput proposed strengthening the second sentence by replacing, in the second sentence, the phrase "they may sometimes have value in providing evidence" with "they may provide evidence".

Mr. Tladi said that he supported the proposal by Mr. Rajput. He further proposed that, in order to better reflect draft conclusion 12 (2), the phrase "and may contribute to the development of a rule of customary international law" should be inserted at the end of the second sentence.

Sir Michael Wood (Special Rapporteur) said that he supported the proposal by Mr. Tladi. Regarding Mr. Rajput's proposed amendment, he wondered if it would be acceptable simply to delete the word "sometimes" and retain the phrase "may have value in providing".

Mr. Rajput said that he would prefer his original proposal.

Mr. Nolte said that the second sentence of the paragraph sought to describe two different situations; should Mr. Rajput's proposed amendment be endorsed, the line

between those two situations would become blurred and the sentence would lose its illustrative character. He would therefore prefer the Special Rapporteur's suggestion simply to delete the word "sometimes".

Mr. Rajput said that he failed to see how his proposed amendment would blur the meaning of the sentence or paragraph. It did make very clear that, although resolutions by themselves could not constitute rules of customary international law or conclusive evidence of customary international law, which was an accepted position, there could be situations where they might provide evidence of customary international law. The International Court of Justice itself had come to that conclusion twice. If that was so, it should be reflected clearly in the paragraph under consideration.

Mr. Saboia supported the statement and proposal made by Mr. Rajput.

Mr. Murphy said that it was important to ensure that the second sentence of paragraph (1) of the commentary to draft conclusion 12 captured paragraphs 2 and 3 of draft conclusion 12. The amendments proposed by Mr. Rajput and Mr. Tladi adequately reflected paragraph 2 but not paragraph 3, in the sense that the resolutions concerned "may reflect a rule of customary international law". He would therefore prefer to revert to the text as originally drafted.

Mr. Nolte said that the proposal by Mr. Rajput made the second sentence somewhat confusing, as the first part of it stated that resolutions adopted by international organizations or at intergovernmental conferences could not serve as conclusive evidence of rules of customary international law, and yet the second part of the sentence, as amended by Mr. Rajput, would go on to say that such resolutions "may" provide evidence.

Sir Michael Wood (Special Rapporteur) said that the sentence as originally drafted had been inspired by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* case, in which it stated that "General Assembly resolutions, even if they are not binding, may sometimes have normative value". While he was not wedded to the use of the word "sometimes" in paragraph (1), he would prefer to retain the notion of "value".

Mr. Park said that he supported the position of the Special Rapporteur on the second sentence of paragraph (1), which had been carefully crafted on the basis of cases considered by the International Court of Justice.

The Chair said he took it that the Commission wished to adopt paragraph (1) as amended by Mr. Tladi and with the deletion, in the second sentence, of the word "sometimes".

Paragraph (1), as amended, was adopted.

Paragraph (2)

Mr. Park said that the words "may offer important evidence of the collective opinions of its members", which appeared in the second sentence, conveyed a similar meaning to the words "may reflect the collective expression of the views of such States", which were used in the first sentence of paragraph (3). While the wording in paragraph (3) seemed too weak, the wording in paragraph (2) was arguably too strong. He therefore proposed switching the language. In paragraph (2), that would entail replacing the words he had highlighted with "may reflect the collective views of its members". In paragraph (3), he would prefer to use the words "may offer important evidence of the collective expression of the views of such States".

Sir Michael Wood (Special Rapporteur) said that the change proposed by Mr. Park was a subtle one. The language in paragraph (2) was stronger, particularly bearing in mind the use of the word "important". In the first part of the session, there had been a great desire within the Commission to emphasize the significance of General Assembly resolutions in the present context. His preference was to retain the wording as it stood.

Mr. Nolte asked whether it would be more logical to speak of the "collective opinion" of members, in the singular.

Sir Michael Wood (Special Rapporteur) said that, although both the singular and the plural were acceptable, he was willing to replace the word "opinions" with "opinion".

Paragraph (2), as amended, was adopted subject to a minor editorial change.

Paragraph (3)

Mr. Tladi proposed that, in the second sentence, the phrase "for the most part do not seek to embody legal rights and obligations" should be deleted. As far as he was aware, the Commission had not carried out any empirical study to determine the veracity of that claim, and, in any event, it was sufficient to say that resolutions were not normally legally binding.

The Chair said that one example that sprang to mind immediately was General Assembly resolution 2131 (XX) of 1965, on the definition of the principle of non-intervention. He took it that the Commission wished to adopt paragraph (3) as amended by Mr. Tladi.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

Mr. Tladi said that, in the last sentence, the word "actual" was superfluous and should be deleted.

Paragraph (8), as amended, was adopted.

The commentary to draft conclusion 12 as a whole, as amended, was adopted.

Commentary to draft conclusion 13 (Decisions of courts and tribunals)

Paragraph (1)

Mr. Murphy said that, in the third sentence, he would prefer to replace the conjunction "and/or" with "or". In the fourth sentence, for the sake of consistency with paragraph (1) of the commentary to draft conclusion 14, the words "*moyen auxiliaire*" should be added, in parentheses, after "subsidiary means".

Mr. Nolte said that, while he shared Mr. Murphy's distaste for the conjunction "and/or", it made eminent sense to use it in the third sentence, as decisions of national courts often served as both practice and evidence of acceptance as law.

Mr. Murphy proposed that the words "as well as" should be used instead of "and/or", since they had the same implications.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Sir Michael Wood (Special Rapporteur) said that, in the first sentence, the words "(in French, *moyen auxiliaire*)" could now be deleted.

Mr. Hmoud said that the meaning of the last sentence was unclear.

Sir Michael Wood (Special Rapporteur) suggested that the sentence would perhaps be clearer if the words "in practice" were replaced with "for the identification of customary international law".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Tladi said that the claim, in the third sentence, that other considerations might include "the composition of the court or tribunal (and the particular expertise of its members)" was problematic and best avoided. There was no practice to support such a claim, nor was any authority cited to substantiate it.

Mr. Nolte said that, in the second sentence, the word "future" should be replaced with "subsequent". To respond to Mr. Tladi's comment, the word "composition" was ambiguous, in that it might refer to the difference between a single judge and a bench, with the latter being associated with higher courts, whose reasoning typically benefited from a greater degree of collective wisdom. The reference to "expertise", on the other hand, was very important and should be retained.

Mr. Tladi said that he would much rather avoid subjective elements, especially as members had stressed that, in its consideration of the topic, the Commission should be guided by practice. The fact that a tribunal was composed of eminent judges did not clarify how it came to a conclusion that something was customary international law, nor did it mean that the tribunal's decisions should automatically be given more weight than those of a tribunal that, while comprising lesser judges, was rigorous in its work.

Mr. Murphy said that the Commission made subjective judgments elsewhere, for example in draft conclusion 14, in which it referred to "teachings of the most highly qualified publicists". Paragraph (3) was in a part of the commentaries in which the Commission was still talking about both national and international courts and tribunals. The distinction that was being drawn through the mention of "expertise" was between courts and tribunals that had no expertise in international law and those that did. While he would be happy to accept the majority view, the third sentence could, in his view, be adopted as it stood.

The Chair said that he sympathized with Mr. Tladi's position. Members of the International Tribunal for the Law of the Sea, for example, were, in principle, elected because of their recognized competence in the field of the law of the sea. The same was not necessarily true of the International Court of Justice, which nevertheless dealt with matters relating to the law of the sea. Indeed, it was the Court's pronouncements that tended to be given greater weight, as they were frequently relied upon by States. The third sentence, as currently worded, seemed to indicate that a decision of the Court on a matter relating to the law of the sea had less value than a decision of the Tribunal, on the basis that the Court's members were not necessarily experts on the law of the sea, whereas the Tribunal's members supposedly were. In reality, however, many members of the Court were, and some members of the Tribunal were not. In his opinion, the Commission should stick to the principle generally applied in tribunals, which was that judges should be knowledgeable about the law.

Mr. Tladi said that there was some authority for the subjective judgment expressed by the Commission in draft conclusion 14, namely the Statute of the International Court of Justice, but there was no such authority for the claim made in the third sentence of paragraph (3). The differences between various types of courts and tribunals were covered in paragraph (4), which could be expanded, if necessary.

Mr. Rajput said that, although he sympathized with Mr. Tladi's concerns, the statement in the third sentence of paragraph (3) was qualified by the word "might" and the phrase "depending on the circumstances". The sentence was carefully crafted and allowed the Commission to take stock of evolving jurisprudence without having to cite empirical studies that risked confusing matters.

Mr. Vázquez-Bermúdez said that he agreed with Mr. Tladi. It was the quality of a court's reasoning and the rigour with which it carried out its work that mattered. The Commission should not encourage scrutiny of judges' qualifications as a means of determining whether their decisions had any merit.

Ms. Escobar Hernández said that she also supported the comments made by Mr. Tladi. By incorporating elements that were clearly subjective, the Commission would be sending the wrong message. Since paragraph (3) dealt with both national and international courts and tribunals, there was the potential for confusion. Moreover, although the Commission did make a subjective judgment in draft conclusion 14, it must be taken into account that publicists acted in their individual capacity, whereas courts and tribunals issued decisions in their institutional capacity, so the personal qualifications of the judges thereof should not be a consideration. She did not object to the reference to the size of the majority by which a decision was adopted. It was not clear, however, what was meant by the phrase "the conditions under which the court or tribunal conducts its work".

Sir Michael Wood (Special Rapporteur) said that he would be happy to delete the phrase "the composition of the court or tribunal (and the particular expertise of its members)".

Mr. Saboia, supported by **Mr. Ruda Santolaria** and **Mr. Gómez-Robledo**, said that, while he would welcome such a deletion, he agreed with Ms. Escobar Hernández that the meaning of the phrase "the conditions under which the court or tribunal conducts its work" was unclear.

Mr. Park said that, during the previous quinquennium, the Commission's Study Group on the most-favoured-nation clause had discussed and analysed a number of international arbitration cases and had found many of the judgments delivered therein to be contradictory. Consequently, most of the members of the Study Group had conceded that the composition of an arbitration tribunal was important in evaluating the value and reliability of its judgments. While the composition of a court or tribunal and the particular expertise of its members were indeed subjective elements, they could not be ignored entirely.

The Chair said that there was a clear distinction to be drawn between the awards of arbitration tribunals and the jurisprudence of a permanent institution like the International Court of Justice. The Commission should not seek to transpose its reasoning about the former to the latter.

Mr. Gómez-Robledo said he hoped that the issue of the value to be accorded to a decision would not be raised again in the context of paragraph (5), which dealt with separate and dissenting opinions, as he would not be in a position to support any changes to that paragraph.

Mr. Jalloh said that it was not clear to him whether the original proposal had been only to delete the part of the third sentence in parentheses — "and the particular expertise of its members". In view of the complex array of regional and subregional courts and tribunals in the African region, for example, the "composition of the court or tribunal" might be a relevant consideration, although he was not opposed to deleting that reference. At the end of the second sentence, he wondered whether the addition of a reference to reception of a decision by "relevant international organizations", such as the International Committee of the Red Cross, might also be considered. The choice of the word "conditions" at the end of the third sentence in relation to the conduct of the court or tribunal seemed very obscure.

Ms. Lehto, referring to the end of the third sentence, said that, if paragraph (3) was intended to refer to both international and national courts and tribunals, the phrase "conditions under which the court or tribunal conducts its work" might serve a purpose, for example in situations in which national courts and tribunals were not truly independent. She would therefore see some merit in retaining it.

Mr. Hmoud said that he had no particular objection to the reference to the composition and expertise of the court or tribunal. He had been a member of the Study Group on the most-favoured-nation clause and recalled that the composition of arbitration tribunals had been a major issue in the discussions, and the relevance of the expertise of a tribunal in the assessment of international law related to investment had also been raised. To his mind there was value in considering the composition of a court or tribunal, but if the

majority of members were in favour of deleting that part of the sentence, he would not oppose that decision, particularly since reference was already made in the second sentence to the importance of the quality of the reasoning in determining the value of decisions. Regarding the phrase "the conditions under which the court or tribunal conducts its work", he wondered whether an alternative might be to refer to the "rules of procedure" or "rules and procedures" under which it conducted its work, which would take into account whether it was part of its mandate to assess customary international law.

Mr. Hassouna said that the composition and expertise of courts and tribunals was, of course, a controversial issue. The starting premise should be that tribunals were different, whether they were national, regional or international or dealt with investment or criminal law or some other subject. Recalling that it had been agreed in the plenary that an effort should be made not to introduce any subjective elements in the commentary, he said he agreed with Mr. Tladi's proposal and welcomed the Special Rapporteur's willingness to delete the reference to expertise. He also agreed that the term "conditions" in relation to the conduct of the court or tribunal's work was rather vague.

Mr. Argüello Gómez said that the question of the decisions of courts was a very sensitive one that should be approached with caution, and the Commission should not give the impression that there were different categories of rulings that could be ranked in terms of importance depending, for example, on the size of the majority by which they had been adopted. He understood that lawyers would use such arguments when alleging the existence of a rule of customary international law, but it was not the Commission's place to do so. He agreed with Mr. Tladi's point about subjective elements.

Mr. Murphy said that, in the part of the commentary under consideration, the Commission was referring not only to the permanent international courts, but to all courts and tribunals. Of course, the Commission would give considerable weight to the decisions of prominent international courts such as the International Court of Justice and the International Tribunal for the Law of the Sea; the question was whether it should also take into account the decisions of national and local courts. The issue raised by Mr. Park concerning the composition and quality of the judgments of arbitration tribunals should also be taken into consideration. Given the objections to the references to the composition and expertise of the members of a court or tribunal, perhaps the formulation "nature of the court or tribunal" might be an acceptable alternative. Although there was a reference in paragraph (7) to exercising caution when seeking to rely on decisions of national courts, in his view it would be unfortunate not to acknowledge in some way in paragraph (3) that those elements mattered, because it was a reality that the Commission did not view the International Court of Justice on a par with lower national courts, for example.

Mr. Tladi said that, while he agreed with the points raised by Mr. Murphy, the sentence under discussion was not just about the nature of the court. His concern was that it referred more specifically to who was on the bench and their expertise, and one of the reasons he felt so strongly about the issue was that it tended to be raised in relation to African courts.

Mr. Petrič said that, while the issue had been resolved by the Special Rapporteur agreeing to delete that part of the sentence, he agreed that the Commission should avoid discussing who was on the bench of a particular court or tribunal. However, given that it was not only the decisions of the International Court of Justice that were in question, but also those of national courts, he would insist on retaining the reference to the circumstances in which the court or tribunal functioned. He had been shocked by some of the decisions taken by high-level courts in Europe in recent years, for example, which appeared to have been politically motivated. Therefore, the circumstances in which a decision had been taken by a court or tribunal, for instance after a coup d'état or under a dictatorship, were highly relevant in determining the importance to be attached to the decision in determining the existence of a rule of customary international law.

Mr. Nolte said that, as there appeared to be significant common ground among the members, perhaps the Special Rapporteur would be able to propose an acceptable alternative text in the light of the discussion on the matter.

Sir Michael Wood (Special Rapporteur) said that, on the basis of the helpful suggestions made by members, he would propose that the third sentence should be reformulated to read: "Other considerations might, depending on the circumstances, include the nature of the court or tribunal; the size of the majority by which the decision was adopted; and the rules and procedures applied by the court or tribunal." The reference to "rules and procedures" would cover concerns about how a court operated.

Mr. Grossman Guiloff said that the fact that paragraph (3) addressed decisions concerning the existence and content of rules of customary international law would automatically exclude many courts. Sufficient safeguards had already been incorporated into the commentary: the references to the "quality of the reasoning" and the "reception of the decision" in determining the value of such decisions covered many of the concerns raised. In the second sentence, the Special Rapporteur might consider the formulation "the value of such decisions varies greatly, however, depending on factors such as ...", so as not to limit the factors that might be taken into consideration. He agreed that the majority by which the decision had been adopted was an important consideration. He supported the deletion of the reference to the composition and expertise of the court or tribunal, which in addition to being subjective was possibly offensive.

Mr. Ouazzani Chahdi said that he supported the compromise solution proposed by the Special Rapporteur, particularly the reference to "rules and procedures", but would welcome clarification of what was meant by the "nature" of the court or tribunal.

Sir Michael Wood (Special Rapporteur) said that the "nature of the court or tribunal" would cover a whole range of characteristics, including whether it was a national, regional or international court or a higher, lower or appeal court, for example. It would simply indicate to the person seeking to identify a rule of customary international law that it was important to look carefully at the court that had handed down the decision.

Mr. Nolte said that he agreed with the Special Rapporteur's proposal but would tweak it slightly to say "the rules and the procedures" rather than "the rules and procedures", as the latter sounded like it referred to a single set of rules and procedures, whereas the former clearly referred to how the procedure had actually been conducted.

The Chair said he took it that the Commission wished to adopt the amendment proposed by the Special Rapporteur with the further modification by Mr. Nolte.

It was so decided.

Paragraph (3), as amended, was adopted.

Paragraphs (4)

Mr. Jalloh asked whether the reference to "regional human rights courts" included regional human rights commissions that issued authoritative decisions on issues of customary international law.

Mr. Grossman Guiloff said that he would welcome clarification of what the Special Rapporteur understood by "other arbitral tribunals applying international law".

Sir Michael Wood (Special Rapporteur) said that if the regional human rights commissions were, in fact, courts, they were included. The reference to "other arbitral tribunals applying international law" was intended to cover investment tribunals that were not inter-State but that had been set up under treaties, in which one party was a State and the other a private company.

Paragraph (4) was adopted.

Paragraphs (5) and (6)

Paragraphs (5) and (6) were adopted.

Paragraph (7)

Mr. Rajput said that the statement in the last sentence about national courts should perhaps be toned down by adding the word "may" before "sometimes lack international law expertise".

Mr. Tladi proposed adding a footnote after the first sentence with a reference to the judgment of the South African Supreme Court of Appeal in *Minister of Justice and Constitutional Development and Others v. South African Litigation Centre and Others*, in which the Court had made a similar point in a slightly different way.

Sir Michael Wood (Special Rapporteur) said that he had no objection to including a reference to a particular paragraph of the judgment. He also accepted Mr. Rajput's proposal.

Paragraph (7), as amended, was adopted.

The commentary to draft conclusion 13 as a whole, as amended, was adopted.

*Commentary to draft conclusion 14 (Teachings)**Paragraphs (1) to (4)*

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Rajput said that he would be interested to know why the Special Rapporteur had used the word "products" rather than "output" in the first sentence to describe the work of international bodies engaged in the codification and development of international law.

Sir Michael Wood (Special Rapporteur) said that, as the term "output" was traditionally used to describe the work of the Commission, he had considered a more general word like "product" to be more appropriate when referring to the work of a range of bodies.

Mr. Nolte said that, the word "output" was actually used in the third sentence to refer to the same "products", so the text should be streamlined and the word "output" used in the first sentence also.

The Chair said he took it that the Commission wished to accept Mr. Nolte's proposal.

It was so decided.

Mr. Grossman Guiloff said that he would be interested to know whether the Special Rapporteur had given any consideration to including a reference to the output of some of the regional bodies representing the principal legal systems and regions of the world, such as the Inter-American Juridical Committee, with which the Commission engaged.

Mr. Nolte said that perhaps adding the words "and from different regions" at the end of the second sentence after "in particular fields" would cover that point.

Sir Michael Wood (Special Rapporteur) said that, as the regional bodies mentioned by Mr. Grossman Guiloff were intergovernmental bodies, it would be inappropriate to refer to them in the section on teachings. However, he had no objection to Mr. Nolte's proposal. He recalled that there had been considerable debate as to whether reference should be made to the work of the Commission itself in the present commentary, but it had been concluded that its output constituted more than simply "teachings" and should thus be dealt with elsewhere.

Mr. Grossman Guiloff said that, in his view, it would be appropriate to refer to the work of the regional bodies in that paragraph because, although they had been created under treaties, their members served in an individual capacity.

The Chair said that those regional bodies with which the Commission maintained formal links of cooperation were the organs of intergovernmental organizations; the Inter-American Juridical Committee, for example, was an organ of the Organization of American States. The Institute of International Law and the International Law Association, meanwhile, were private institutions, and did not fall into the same category.

Mr. Jalloh said that he supported Mr. Nolte's proposal, which in his view adequately addressed Mr. Grossman Guiloff's concerns.

The Chair said he took it that the Commission wished to accept Mr. Nolte's proposal.

It was so decided.

Paragraph (5), as amended, was adopted.

The commentary to draft conclusion 14 as a whole, as amended, was adopted.

Part Six (Persistent objector)

The chapeau of Part Six was adopted.

Commentary to draft conclusion 15 (Persistent objector)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Nguyen proposed replacing the word "formation" with "emergence".

Paragraph (2), as amended, was adopted.

Paragraph (3)

Mr. Murphy proposed replacing the words "and/or" in the first sentence simply with "or".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Mr. Tladi said that the sources in footnote 115 to paragraph (4) should be reordered on the basis of two criteria: first, the nature of the forum that handled the cases mentioned; and, second, whether or not the persistent objector rule had been recognized in a particular case.

Sir Michael Wood (Special Rapporteur) said that, in footnote 115, international tribunals had been listed first, followed by national tribunals. In his opinion, that approach worked well; sources in other footnotes had not been arranged according to their degree of relevance.

Mr. Jalloh said that the question raised by Mr. Tladi, and Sir Michael Wood's answer, were related to the question he had asked earlier. Since footnote 115 contained a reference to the Inter-American Commission on Human Rights, he took it that the term "human rights courts" in paragraph (4) of the commentary to draft conclusion 13 was intended to include human rights commissions such as the Inter-American Commission on Human Rights and the African Commission on Human and Peoples' Rights. The distinction drawn in that earlier paragraph had not been made clear in the paragraph under consideration; although he was simply stating his position, he felt it was important to clarify the point.

Mr. Argüello Gómez said he wished to point out that the *Fisheries* case, which was mentioned in footnote 115, had not established the principle of the persistent objector rule.

The term appeared in the judgment of the case strictly *obiter dictum* and had not been taken up by the dissenting judges.

Sir Michael Wood (Special Rapporteur) said that the *Fisheries* case was often referred to in connection with the persistent objector rule, including in documents of the Commission.

Ms. Oral, supported by **Mr. Jalloh**, said that the first sentence could be made clearer either by deleting the words "not infrequently invoked" or by inserting the word "is" before "recognized" and removing the comma after "recognized".

Mr. Šturma, supported by **Mr. Saboia**, proposed replacing the words "not infrequently" with "sometimes" to avoid placing too much importance on the role of the persistent objector rule.

Mr. Murphy said that the word "invoked" ought to be retained, since in footnote 116 attention was being drawn to situations in which a State invoked the rule but its validity might not be recognized by other States, depending on the circumstances. It would be preferable to leave the sentence in its original form.

Mr. Park agreed with Mr. Murphy that the sentence should remain as it was.

Sir Michael Wood (Special Rapporteur) said that he preferred to leave the sentence unchanged since it was close to the language that had been used on first reading, to which States had not objected, and it captured better the intended meaning.

Paragraph (4) was adopted.

Paragraphs (5) to (10)

Paragraphs (5) to (10) were adopted.

The commentary to draft conclusion 15 as a whole, as amended, was adopted.

Part Seven (Particular customary international law)

The chapeau of Part Seven was adopted.

Commentary to draft conclusion 16 (Particular customary international law)

Paragraphs (1) to (4)

Paragraphs (1) to (4) were adopted.

Paragraph (5)

Mr. Murphy proposed deleting the word "always" in the first sentence of paragraph (5) and replacing the word "should" with "could" in the second sentence.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Paragraph (6) was adopted with minor editorial corrections.

Paragraph (7)

Paragraph (7) was adopted.

The commentary to draft conclusion 16 as a whole, as amended, was adopted.

The Chair invited the Commission to turn its attention to section C of chapter V, contained in document A/CN.4/L.918, recalling that paragraph 11 in that section had been left in abeyance.

C. *Recommendation of the Commission**Paragraph 11*

Sir Michael Wood (Special Rapporteur) said that his original proposal for paragraph 11, the text of which had been circulated in the meeting room, had been identical to the Commission's recommendation to the General Assembly in paragraph 129 of his fifth report (A/CN.4/717). He had received two proposals for additions to that text. Mr. Murase had proposed a reference to the bibliography, so a new subparagraph had been inserted, paragraph 11 (c), that would read "take note of the bibliography prepared by the Special Rapporteur". Mr. Jalloh had proposed that in paragraph 11 (c) (ii), the words "including by their timely publication" should be added before the semicolon. The Secretariat had been consulted on the content of paragraph 11 and was satisfied with it.

Mr. Tladi said that he had concerns about the inclusion of a recommendation that the General Assembly should take note of a bibliography. In his experience, the General Assembly was often reluctant to do so.

Mr. Rajput said that he shared Mr. Tladi's concerns.

Mr. Murase said that it was important for the General Assembly to take note of the bibliography since it was contained in a separate document to the commentaries.

Mr. Nolte said that although he was reluctant to refer the General Assembly to material that had not been produced by the Commission, the bibliography served an important function in highlighting the representativeness of the Commission's work on the draft conclusions and its roots in the wider community. He therefore supported the inclusion of the recommendation regarding the bibliography.

Sir Michael Wood (Special Rapporteur), supported by **the Chair**, said that, while he would not insist on the inclusion of the reference to the bibliography, an alternative could be to replace the words "take note of" with "note". When the resolution was drafted in New York, a decision could then be taken as to whether to include a reference to the bibliography, for example, in the preamble, or to omit it.

Mr. Park said that the inclusion of the reference to the bibliography would set an important precedent, since the Commission's work on other topics, including the provisional application of treaties and protection of the environment in relation to armed conflicts, had also included bibliographies. Another option could be to include the reference in subparagraph (a) rather than having it as a separate subparagraph.

Mr. Jalloh said that he wished to place on record his reservations about the process of formulating the recommendation. As he had said in his statement on the topic of identification of customary international law in the first part of the current session, the substantial work contained in the 172-page memorandum by the Secretariat on "Ways and means for making the evidence of customary international law more readily available" (A/CN.4/710) deserved further discussion by the Commission. Had time allowed for such a discussion, the Commission might have produced a stronger set of recommendations. It was regrettable that, given that the Commission's previous study of the issue had been prepared as long ago as 1950, such an important recommendation to the General Assembly had not benefited from thorough deliberation, particularly in view of the imbalance in the availability of evidence of customary international law in developing countries, especially in the African region.

Mr. Huang said he was concerned that, having spent a great deal of time on the consideration of other paragraphs in chapter V, the Commission was now in too much of a hurry to adopt the most important paragraph, the one containing the recommendation to the General Assembly. Moreover, he was not sure whether such an important paragraph should be considered in English only, without translations into the other official languages.

He did not support the inclusion of the reference to the revised bibliography, since it was limited and selective and contained few works in languages other than English and French.

Lastly, it was unclear what "and other entities", at the end of paragraph 11 (c) (iii), referred to. It would not be appropriate to request the Secretariat to make efforts to correct information and sources from entities that had no relationship to the Commission or its work.

Mr. Llewellyn (Secretary to the Commission) said that the Special Rapporteur's proposal for paragraph 11, which had been put forward in the original language of the report could perhaps be read aloud in plenary for interpretation into the other official languages.

The Chair said that it would be preferable to avoid any procedural shortcomings in the adoption of the report, as they might be used to question the Commission's recommendations to the General Assembly regarding the draft conclusions.

Sir Michael Wood (Special Rapporteur) said that, with the exception of the two additions by Mr. Murase and Mr. Jalloh, his proposal was identical to paragraph 129 of his report, which had already been translated into the other official languages. With regard to the bibliography, he had repeatedly asked the members to contribute items in their own languages. It was unfortunate that time constraints had not allowed for more detailed discussion of the memorandum by the Secretariat; however, it could be discussed further at a future meeting.

The meeting rose at 1.10 p.m.

Provisional

For participants only

12 October 2018

Original: English

International Law Commission

Seventieth session (second part)

Provisional summary record of the 3444th meeting

Held at the Palais des Nations, Geneva, on Monday, 6 August 2018, at 10 a.m.

Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter V. Identification of customary international law (continued)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

<i>Chair:</i>	Mr. Valencia-Ospina
<i>Members:</i>	Mr. Argüello Gómez
	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrič
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Šturma
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 10.10 a.m.

Draft report of the Commission on the work of its seventieth session (continued)

Chapter V. Identification of customary international law (continued) (A/CN.4/L.918 and A/CN.4/L.918/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter V of the draft report contained in document A/CN.4/L.918. He recalled that paragraphs 11 and 12 had been left in abeyance.

C. Recommendation of the Commission

Paragraph 11

The Chair said that a proposal by the Special Rapporteur for the paragraph had been circulated among members in all the official languages of the United Nations under the symbol ILC(LXX)/INFORMAL/3. The paragraph would read:

"11. At its ... meeting, on ... 2018, the Commission decided, in accordance with article 23 of its statute, to recommend that the General Assembly:

(a) Take note of the draft conclusions of the International Law Commission on the identification of customary international law in a resolution, annex the draft conclusions to the resolution, and ensure their widest dissemination;

(b) Commend the draft conclusions, together with the commentaries thereto, to the attention of States and all who may be called upon to identify rules of customary international law;

(c) Take note of the bibliography prepared by the Special Rapporteur;

(d) Take note of the Secretariat memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710), which surveys the present state of evidence of customary international law and makes suggestions for its improvement;

(e) Follow up the suggestions in the Secretariat memorandum by:

(i) calling to the attention of States and international organizations the desirability of publishing digests and surveys of their practice relating to international law, of continuing to make the legislative, executive and judicial practice of States widely available, and of making every effort to support existing publications and libraries specialized in international law;

(ii) requesting the Secretariat to continue to develop and enhance United Nations publications providing evidence of customary international law, including their timely publication; and

(iii) also requesting the Secretariat to make available the information contained in the annexes to the memorandum on ways and means for making the evidence of customary international law more readily available (A/CN.4/710) through an online database to be updated periodically based on information received from States, international organizations and other entities."

Sir Michael Wood (Special Rapporteur) said that, in the light of the discussion that had taken place at the previous meeting, he wished to propose three minor changes. First, he proposed that, in subparagraph c., the word "note" should be used instead of "take note of" and that a footnote reference to the source of the bibliography, namely document A/CN.4/717/Add.1, should be added at the end of subparagraph. Secondly, in subparagraph d., the words "take note of" should again be replaced with "note", the idea being that subparagraphs c. and d. would best be noted by the General Assembly in a preambular paragraph of a resolution, rather than taken note of formally in an operative paragraph. Thirdly, at the very end of subparagraph e. (iii), he proposed the addition of the word "concerned" and a reference to paragraphs 7 to 10 of document A/CN.4/710, which made

clear which Member States, other States, entities and learned societies had been consulted by the Secretariat. In particular, mention was made, in paragraph 8, of "all entities in the United Nations system and all entities and organizations which ... had received a standing invitation to participate as observers in the sessions and the work of the General Assembly". The first line of paragraph 11 would need to be completed with the appropriate meeting number and date.

Mr. Nolte said that, while he agreed with the proposal for the paragraph, he wondered at what point the draft conclusions would become conclusions. By the time the report of the Commission on the work of its seventieth session came to be published, the Commission would have completed its work on the texts, which it would thus no longer consider as drafts. Given that the texts were not designed to serve as the basis for a treaty, they would not be viewed as drafts by States, either. If the Commission's adoption of the texts on second reading was what transformed them from draft conclusions into conclusions, the correct status of the texts should be reflected in paragraph 11.

Mr. Huang, referring to the Chinese version, said that the translation of subparagraph a. was inaccurate and gave the impression that the resolution mentioned was a resolution of the Commission, rather than of the General Assembly. It would be helpful, in that regard, to clarify the wording of the subparagraph in the English original. He agreed with the three changes proposed by the Special Rapporteur, which addressed the points he had raised at the previous meeting.

The Chair proposed that, to respond to Mr. Huang's concern, the words "in a resolution" should be moved from their current position and placed after the words "take note".

Mr. Vázquez-Bermúdez said that it would be more accurate to speak of "conclusions" than "draft conclusions".

The Chair said that, when products that were not intended to serve as the basis for a treaty, such as conclusions, guidelines and principles, came to be sent to the General Assembly, it made sense for the qualifier "draft" to be dropped.

Mr. Llewellyn (Secretary to the Commission) said that, regardless of the product, the Commission's practice was to describe texts as drafts until the General Assembly had annexed them to a resolution and commended them to the attention of States.

The Chair said that the act of annexation by the General Assembly did not transform draft texts into texts. In any event, the Commission's practice should be followed.

Mr. Murphy said that, at least in theory, the General Assembly might decide that it was not entirely happy with the Commission's work and send it back for further modifications. Although such a scenario was unlikely, it would be presumptuous of the Commission to assert that its work on a particular product was done until the General Assembly had reached a decision thereon.

He wondered what implications the proposed amendment to subparagraph a. would have for the other subparagraphs. To his knowledge, it was not only subparagraph a. that the Commission wished to see addressed in a resolution of the General Assembly.

Sir Michael Wood (Special Rapporteur) said that it was well understood that subparagraphs a. and b., which contained fairly standard language, would be reflected in the operative part of a resolution, whereas subparagraphs c. and d. were likely to be addressed in the preamble. It remained to be seen how subparagraph e. would be dealt with, but the proposed amendment to subparagraph a. would have no implications in that respect.

The Commission should not distinguish between its differently named products, all of which should be described as drafts when they came to be submitted to the General Assembly.

Paragraph 11, as amended, was adopted.

Mr. Jalloh said that the memorandum by the Secretariat entitled "Ways and means for making the evidence of customary international law more readily available" should

have been the subject of a more in-depth discussion during the current session, especially in view of the fact that the Commission's previous study on the issue had been conducted in 1950. The Commission's mandate for such a discussion was clearly established in article 24 of its statute.

He was grateful to the Special Rapporteur for accommodating his proposal to encourage the timely publication of United Nations publications providing evidence of customary international law. He noted, in that regard, that a number of documents were outdated. For example, as far as he could tell, the Repertory of Practice of United Nations Organs had last been published in 2009, while the Repertoire of the Practice of the Security Council had not been updated since 2013. His hope and understanding was that the Commission would not wait another 68 years to give effect to article 24 of its Statute. With that in mind, it should set aside some time, ideally at its seventy-first session, for a substantive discussion on the availability of evidence of customary international law, the lack of which represented a real challenge for many countries, especially in Africa.

The Chair said that the Commission would have benefited from having at least one additional week of meeting time during the current session.

D. Tribute to the Special Rapporteur

Paragraph 12

The Chair said that the beginning of the paragraph would read: "At its 3444th meeting, held on 6 August 2018,".

Paragraph 12 was adopted by acclamation.

Document A/CN.4/L.918 as a whole, as amended, was adopted.

Chapter V of the draft report as a whole, as amended, was adopted.

Sir Michael Wood (Special Rapporteur) said that he would like to thank all those who had contributed to what was very much a collective work, in particular the Chair and all the other members of the Commission, past and present. A special word of thanks was due to Mr. Jalloh and his predecessors as Chair of the Drafting Committee, and to Mr. Vázquez-Bermúdez, who had chaired the working group on commentaries. He mentioned the special role of two past members of the Commission: Mr. Candiotti who, as Chair of the Working Group on the Long-term Programme of Work, had always been very encouraging; and Mr. Forteau, who had been instrumental in revising the title of the topic. He also thanked the Secretariat, and especially David Nanopoulos and before him, Gianeta Buzzini, the author of the memorandum entitled "Elements in the previous work of the International Law Commission that could be particularly relevant to the topic". He owed a great debt to his assistants in the Commission, and first and foremost to Omri Sender, who had arrived in Geneva on the very day that the topic had been placed on the Commission's programme of work and who had stayed with the project throughout.

Chapter IV, Subsequent agreements and subsequent practice in relation to the interpretation of treaties (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to consider chapter IV of its draft report, beginning with the text contained in document A/CN.4/L.917.

A. Introduction

Paragraph 1

Mr. Murphy proposed that, in the first sentence, which was a little confusing, the words "at its sixty-first session" should be deleted, and the words "at its following session" should be inserted after "establish".

Paragraph 1, as amended, was adopted.

Paragraphs 2 to 5

Paragraphs 2 to 5 were adopted.

B. Consideration of the topic at the present session

Paragraphs 6 to 8

Paragraphs 6 to 8 were adopted.

Paragraph 9

Paragraph 9 was adopted, subject to its completion by the Secretariat.

Paragraph 10

Paragraph 10 was adopted.

C. Recommendation of the Commission

Paragraph 11

Paragraph 11 was left in abeyance.

D. Tribute to the Special Rapporteur

Paragraph 12

Paragraph 12 was left in abeyance.

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

1. Text of the draft conclusions

Paragraph 13

Paragraph 13 was adopted.

The Chair invited the Commission to consider the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

E. Text of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties

2. Text of the draft conclusions and commentaries thereto

Paragraph 1

Paragraph 1 was adopted.

Subsequent agreements and subsequent practice in relation to the interpretation of treaties

Part One (Introduction)

Commentary to draft conclusion 1 (Scope)

Paragraphs (1) and (2)

Mr. Tladi said that, in the third sentence of paragraph (1), the words "authorities and examples" should be replaced with "aspects", as it was not the draft conclusions themselves that provided authorities and examples, but the commentaries thereto.

It was so decided.

Mr. Murphy proposed that the order of paragraphs (1) and (2) should be reversed, in line with what had been done in relation to a recent topic.

Paragraphs (1) and (2) were adopted on that understanding.

Paragraph (3)

Mr. Park said that the third sentence was more or less repeated elsewhere in the document, including in paragraphs (1) and (13) of the commentary to draft conclusion 5. He wondered whether such repetition was necessary.

Mr. Murphy said that, in the second sentence, it might be preferable to say "one aspect not dealt with generally" rather than "one aspect not dealt with specifically," as international organizations were discussed to some extent. For the sake of clarity, he proposed splitting footnote 2 in two: a full stop should be inserted after the citation to the 1986 Vienna Convention and the words "this does not exclude that" deleted. The new second sentence should then read: "Some materials relating to such treaties, but which are also of general relevance, are used in these commentaries."

Paragraph (3), as amended by Mr. Murphy, was adopted

Paragraph (4)

Mr. Park said that, in the second sentence, the phrase "as well as for non-State actors and all others who are called upon to interpret treaties" was unclear. He proposed deleting the words "and all others" and adding the word "concerned" after "non-State actors".

Mr. Nolte (Special Rapporteur) said that, in his view, it was important to retain the reference to "all others". In the context of the topic of identification of customary international law, the Commission had adopted in its recommendation to the General Assembly the formulation that it should commend the conclusions and commentaries thereto "to the attention of States and all who may be called upon to identify rules of customary international law". The draft conclusions under discussion were aimed at all those who were called upon to interpret treaties, not only non-State actors but also others who were not established as organizations, even private individuals. The addition of the word "concerned" seemed to introduce an unnecessary restriction. He would therefore prefer to retain the original formulation of the sentence.

Mr. Murphy said that, if the Special Rapporteur wished to follow the approach taken in the topic of identification of customary international law, it should be recalled that in that context reference had simply been made to "other entities" and not to "non-State actors and other entities". The formulation "non-State actors and all others" was confusing, as it was not clear who the "others" were. He therefore proposed deleting the words "for non-State actors and all" so that the phrase would simply read "as well as others who are called upon to interpret treaties".

Sir Michael Wood said that he agreed with Mr. Murphy but would favour keeping the word "all" before "others".

Mr. Saboia said that he supported the language proposed by the Special Rapporteur and saw no problem with the reference to "non-State actors".

Mr. Nolte (Special Rapporteur) said that he did not believe there was any need to enter into questions of principle on that point; he would not oppose the deletion of the reference to non-State actors, although he saw no particular reason for doing so. He drew attention to the formulation used in draft conclusion 5 (2) — "other conduct, including by non-State actors" — which introduced the same distinction.

Mr. Tladi said that, while he agreed with the reasoning put forward by both sides and would accept any of the proposals, as they were substantively the same, he believed that Mr. Murphy's proposal captured the idea and did not exclude non-State actors, since they were included in the formulation "all others". The text of draft conclusion 5 (2) did not refer to the "conduct of others, including non-State actors," but rather to "other conduct, including by non-State actors".

Mr. Zagaynov said that he supported Mr. Murphy's proposal.

The Chair said that, if he saw no objection, he would take it that the Commission wished to adopt the paragraph with the amendment proposed by Mr. Murphy and further modified by Sir Michael Wood.

Mr. Nolte (Special Rapporteur) said that, as he considered that point to be of minor importance in that particular instance, he would go along with the proposal, but without prejudice to the treatment of issues relating to non-State actors or others in different contexts.

Paragraph (4), as amended, was adopted

The commentary to draft conclusion 1 as a whole, as amended, was adopted

Part Two (Basic rules and definitions)

Commentary to draft conclusion 2 (General rule and means of treaty interpretation)

Paragraph (1)

Mr. Tladi said that he had already discussed his proposal with the Special Rapporteur, who had strong opposing views on the matter. The third sentence — "First, article 31, as a whole, is the 'general rule' of treaty interpretation" — was, of course, based on the title of article 31 of the 1969 Vienna Convention. His proposal was to add a second sentence to footnote 3, to read: "See, however," followed by a reference to views expressed in the literature that the general rule was not article 31 as a whole, but rather article 31 (1). The references he proposed to cite were from the chapter that he had authored, "Interpretation of Treaties in an International Law-Friendly Framework: the case of South Africa", in the book co-edited by the Special Rapporteur, *The Interpretation of International Law by Domestic Courts*, and from a book by Dörr. The Special Rapporteur had expressed the concern that such an approach — mentioning the opposing views of certain members in the commentary — was usually only followed on first reading. If that was the issue, he would be happy to exclude the reference to the chapter he had written and to instead cite another author who had expressed the same view. He believed it would be appropriate in that instance to refer to the chapter he had authored simply because it dealt specifically with the draft conclusion that had been adopted provisionally in 2016. Reference had been made on previous occasions to differing views in the literature. In fact, paragraph (4) of the commentary to draft conclusion 3 included the formulation "notwithstanding the suggestions of some commentators," accompanied by a rather lengthy list of writings in footnote 47. It was only fair to make readers aware that the approach adopted by the Commission was not the only one, even if it was indicated that the Commission believed those alternative views were wrong. That would in no way detract from the Commission's work. He reiterated that it was only fair to let readers know that different views existed.

Sir Michael Wood said that it was not only the Commission, but also the States that had adopted the Vienna Convention, which had agreed to the title of article 31. He would be opposed to trying to attenuate what seemed to be an important point that should be stated clearly. He was in favour of maintaining the text as originally drafted.

Mr. Nolte (Special Rapporteur) said that the footnote, which referred to the title of article 31 of the Vienna Convention, was obviously correct. He recalled that, in 1966, the Commission had explained in the commentary to the draft articles on the law of treaties why it had chosen "general rule" as the title of article 31. It had stated:

"The Commission, by heading the article 'General Rule of Interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation. All the various elements, as they were present in any given case, would be thrown into the crucible and their interaction would give the legally relevant interpretation. Thus Article 27 is entitled 'General rule of interpretation' in the

singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule."

That text was quoted later in the commentaries in connection specifically with the interaction between the different means of interpretation. There had been multiple debates on how to situate paragraph 1 in relation to the other articles, and the formulation that appeared in the text of the commentary under consideration had been agreed on by all members in 2016, including Mr. Tladi. He did not believe it would be appropriate to reopen that debate and introduce a controversial element into the text at that late stage. Mr. Tladi's proposal could give rise to misunderstandings rather than additional clarity. He therefore shared Sir Michael Wood's view and did not wish to make any changes to the sentence or the footnote.

Mr. Tladi said that, although he understood that his proposal was unlikely to be accepted, he wished to put his views on record. In fact, the reference from the chapter that he had written that he had wished to have cited in the footnote included the same sentence just quoted by the Special Rapporteur from the Commission's 1966 commentary. The proposed citation then continued:

"In the view of this author, Art 31 (3) constitutes part of the general rule in the sense that it contributes to, or facilitates, the determination of the meaning of the terms of the treaty, in good faith, in their context and taking into account the object and purpose of the treaty. It is for this reason that the injunction in Art 31 (3) is for the interpreter to *take into account* subsequent agreements, subsequent practice, and relevant rules of international law, while there is an absolute obligation in Art 31 (1) to give effect to the ordinary meaning of the terms, in their context and taking into account the object and purpose of the treaty. Thus, to borrow from the words of the Commission in 1966, there is a 'single combined operation' in which the subsequent practice and subsequent agreements are applied to give effect to the ordinary meaning of the terms of the treaty, in their context and in the light of the object and purpose of the treaty."

It was merely an attempt to understand what was meant by the title of article 31. From his perspective, it would be a shame for the Commission to pretend that the view it expressed in the commentary about the title of article 31 was the only one. In seeking to hide the fact that there were alternative views on the matter, the Commission would give the impression that it was unsure of its own arguments and did not want objective readers to be able to see different views and to make a determination for themselves.

Mr. Nolte (Special Rapporteur) said that the fact that the Commission did not quote the views of all authors in the commentary did not mean that there was any attempt to hide them. In fact, for some topics, the Commission quoted no academic literature at all. Once one went deeper into a particular question, one would always find authors who held different views; it was simply a question of whether the Commission wished to highlight them. It was not clear what the practical consequences of Mr. Tladi's proposal would be. He would not support changing the text, which had already been adopted by the Commission multiple times.

Mr. Murphy said that his understanding of the general rule in article 31 might well encompass what Mr. Tladi was talking about, namely that there was, to a certain degree, a dominant focus on paragraph 1. He would be happy to support the Special Rapporteur's preference to retain the current paragraph as originally drafted but was sympathetic to Mr. Tladi's point that in other parts of the commentaries there did seem to be an acknowledgement of minority views or views that the Commission itself had not adopted. He would prefer in those situations to also exclude the alternative views because they were not part of what the Commission was attempting to put forth.

Mr. Tladi said that his proposal was of practical significance for two reasons. First, as the Commission now attached almost as much importance to the commentary as to the draft conclusions themselves, what was said in the commentary now carried more weight. While he might have paid less attention to such points in the past, as in 2016 when the commentary had been adopted on first reading, it was much more difficult to do so at the

current juncture. Second, it seemed that the Commission was elevating subsequent practice and subsequent agreements and stating that, in certain instances, subsequent agreements were conclusive. He was concerned that, as a result, no real distinction was being made in terms of weight between article 31 (1) and 31 (3). However, he would not stand in the way of a consensus.

The Chair said that, on that understanding, he took it that the Commission wished to adopt paragraph (1) as originally drafted.

Paragraph (1) was adopted.

Paragraph (2)

Paragraph (2) was adopted.

Paragraph (3)

Mr. Murphy said that, as the second sentence was very long and somewhat complicated, his proposal was to split it in two. The words "the application of" should be inserted before "the primary means of interpretation according to article 31" and the words "set forth in article 32" should be added after "supplementary means of interpretation," followed by a full stop. The words "to which" would then be deleted at the beginning of the next sentence, which would read: "Recourse may be had to the supplementary means of interpretation" and continue to the end as originally drafted.

Paragraph (3), as amended, was adopted with a minor editorial change to footnote 6.

Paragraph (4)

Mr. Murphy proposed deleting the parentheses in the middle of the final sentence, as the bracketed text was an important clause. At the very end of the paragraph, the words "for the States parties concerned" should be added after the phrase "entry into force of the Vienna Convention," as it was not the entry into force of the Convention itself that was at issue, but the entry into force for States that ratified the Convention, possibly at a much later stage.

Mr. Jalloh said that, for the sake of clarity and precision, in the third sentence the word "in particular" before the list of courts and tribunals should be replaced with "for instance" to indicate that it was a non-exhaustive list of examples.

Sir Michael Wood said that, in the first sentence, the word "enshrined" should be replaced with "set forth".

Mr. Nolte (Special Rapporteur) said that he agreed with the proposals by Sir Michael Wood and Mr. Murphy and, in principle, with Mr. Jalloh's suggestion, although he would prefer "for example" to "for instance".

Paragraph (4), as amended, was adopted.

Paragraphs (5) to (8)

Paragraphs (5) to (8) were adopted.

Paragraph (9)

Paragraph (9) was adopted with a minor editorial amendment.

Paragraph (10)

Mr. Murphy said that the second sentence of paragraph (10) appeared to claim that subsequent practice not in application of the treaty might be relevant, thereby contradicting what was said in the first sentence. Since it would be preferable to leave the issue open, he wished to propose the insertion of the words "it is possible that" at the beginning of the second sentence and the deletion of the word "however". In the last sentence, the words

"requires that" should be replaced with "refers to", in order to better reflect the fact that the Commission was indicating its conclusions with regard to the law.

Mr. Nolte (Special Rapporteur) said that he failed to understand what the insertion of the phrase "it is possible that" would add in terms of the meaning of the sentence. Contrary to Mr. Murphy's assumption, the Commission was not taking a position on the issue, as reflected by the use of the word "may". With regard to Mr. Murphy's second proposal, in his opinion the words "requires that" could not give rise to any misunderstanding.

Sir Michael Wood said that, while he agreed with the deletion of the word "however", he was not in favour of the other proposed amendments to the second sentence. He supported the proposed amendment to the last sentence, which did not change the original meaning.

Mr. Murphy said that the second sentence, both in its original formulation and in the version proposed by Sir Michael Wood, was inconsistent with the first sentence. Since the Commission had decided to elevate the commentaries almost to the same level as the draft conclusions, the second sentence was inappropriate and should therefore be either deleted or softened to indicate that the Commission was not taking a position on the question. As it stood, it appeared that the Commission was taking a position; that was completely wrong, since the Commission had not analysed the question and did not view it as part of the project under consideration.

Mr. Nolte (Special Rapporteur) said that the first sentence made clear that the question was not addressed in the draft conclusions themselves; whether the Commission should explain in the commentaries the relationship between certain aspects of the topic was a separate issue. The same approach had been adopted in the context of the topic of the identification of customary international law. The proposal was not a far-reaching one; indeed, article 32 of the 1969 Vienna Convention spoke of supplementary means of interpretation in a very general way. That phenomenon was very close to subsequent practice not in the application of the treaty; there was therefore no risk in saying that in certain circumstances it might be relevant. The formulation had been agreed on first reading without much debate.

Mr. Tladi said that he supported Mr. Murphy's position. There were other instances where the commentaries dealt with issues that were not covered by the draft conclusions; since the commentaries had been elevated it was not appropriate to address in them issues that were not squarely within the scope of the topic.

Mr. Murphy said that the only support offered for the case that subsequent practice by States parties not in the application of the treaty constituted relevant practice in respect of article 32 appeared in footnote 24, in a reference to the Special Rapporteur's own book. Although he himself would prefer to delete the second sentence altogether, he had simply proposed softening it in order to capture the meaning intended by the Special Rapporteur. The point merited consideration since Governments had reacted to it after the first reading. The objective on second reading was to take account of the views that Governments had put forward; in the case under consideration some had reacted adversely. His original proposal therefore constituted a satisfactory means of attempting to retain the point in a manner that was responsive to the views received.

Mr. Nolte (Special Rapporteur) said that the scope of the topic was defined by its title and the question under discussion fell squarely within that. The citation in footnote 24 referred to the work of an esteemed colleague in a book he had edited, rather than to his own writings. If it would allay Mr. Murphy's concern, he was prepared to add a reference to the International Court of Justice, which had taken into account in the interpretation of treaties, reports by States which had not been agreed to by another State. As far as he was aware, the only Government that had reacted adversely to the point after the first reading was that of the United States of America.

Mr. Saboia said that if Governments had reacted to the point, that reaction should be acknowledged and taken into account on second reading. It was unclear whether by dealing with the question in the manner adopted in paragraph (10) the Commission was

engaging in progressive development in terms of the understanding of the law on the application of the Vienna Convention and the understanding of that instrument.

Mr. Rajput said that the deletion of the word "also" in the second sentence might perhaps go some way to addressing Mr. Murphy's concern, since it would lessen the connection with practice not in application of a treaty.

Sir Michael Wood proposed that, in the second sentence, the word "relevant", should be replaced with "possible".

The Chair said that it was his understanding that the members agreed that the second sentence should be amended to read: "Such practice may, under certain circumstances, also be a possible supplementary means of interpretation".

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murphy proposed that, in the first sentence of paragraph (11), the word "complete" should be replaced with "end".

Paragraph 11, as amended, was adopted.

Paragraph (12)

Mr. Murphy said that, in the first sentence of paragraph (12), the word "on" should be replaced with "involving". Footnote 29 should be deleted, since it was another example of a situation in which the Commission had not accepted or pursued the consideration of a particular question.

Mr. Nolte (Special Rapporteur) said that the second sentence of the paragraph, to which footnote 29 referred, simply said that the Commission had not considered it necessary to include a reference; it did not say that it had found the idea questionable. The section of his first report referred to in footnote 29 compared various means of interpretation in order to arrive at a certain result; it was helpful to the reader and there was no reason to delete it.

Sir Michael Wood said that he found it odd to include in commentaries references to Special Rapporteurs' reports; it was much better for commentaries to be self-contained. As a compromise, the footnote could simply make reference to paragraphs 8 to 28 of the Special Rapporteur's first report, without the inclusion of the quote.

Mr. Nolte (Special Rapporteur) said that, while he could accept Sir Michael Wood's proposal, the Commission should be wary of stating general rules about references to the reports of Special Rapporteurs. If his memory was correct, the Commission had just adopted commentaries on the topic of the identification of customary international law that contained such references.

The Chair said that he took it that the members accepted Sir Michael Wood's proposal regarding footnote 29.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

Mr. Murphy said that, for the sake of clarity, the third sentence of paragraph (14) should be reformulated to read: "The interpreter should identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing a proper emphasis on them in good faith."

Mr. Nolte (Special Rapporteur) said that he was not in favour of Mr. Murphy's proposal as it involved not merely stylistic changes but also substantive ones. The sentence sought to explain a rule of interpretation under the Vienna Convention that must — and not

simply should — be followed. Mr. Murphy had not explained why he wished to delete, for example, the words “as required by the rule to be applied”; the principle of good faith was not merely an abstract principle, it could acquire a specific meaning when seen from the perspective of the rule concerned.

Mr. Murphy said that the intended meaning of the first part of the sentence was not clear. Did the phrase “rule to be applied” refer to the rules set forth in the Vienna Convention, the rule of the treaty being interpreted or some other rule of international law relating to good faith?

Mr. Nolte (Special Rapporteur) said that sentences should not be read in isolation. The sentence in question followed on from the previous sentence, which stated: “This is not to suggest that a court or any other interpreter is more or less free to choose how to use and apply the different means of interpretation.” The following sentence emphasised the point that the interpreter was not free and should be guided by certain factors; it was an important point to make since it was sometimes said that rules on interpretation had little content. It was important that the Commission should make, and substantiate, the statement that the interpreter was not free and that articles 31 and 32 of the Vienna Convention had meaning. Although in his opinion it was already explicit, the word “treaty” could be added before “rule”.

Sir Michael Wood said that, as the first part of the sentence was particularly obscure, it should be amended to read: “The interpreter needs to identify the relevance of different means of interpretation in a specific case and determine their interaction with the other means of interpretation by placing ...”.

It was so decided.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted with some minor editorial amendments.

The commentary to draft conclusion 2 as a whole, as amended, was adopted.

Commentary to draft conclusion 3 (Subsequent agreements and subsequent practice as authentic means of interpretation)

Paragraph (1)

Mr. Rajput said that the use of the word “significant” in the first sentence of paragraph (1) seemed to assign a primordial role to subsequent agreements and subsequent practice, which was inappropriate, as they were but one means of interpretation of treaties. It was only in paragraph (4) that it was made clear that there was no hierarchy among the means referred to in article 31 of the 1969 Vienna Convention on the Law of Treaties. Given the structure of the commentary to draft conclusion 3 as a whole, and the fact that paragraph (1) was an introductory paragraph, he proposed replacing the phrase “the reason why those means are significant” with “its role”.

Mr. Nolte (Special Rapporteur) said that he did not support the proposal made by Mr. Rajput. It was not the role of subsequent agreements and subsequent practice that was being described as authentic. In the *travaux préparatoires* relating to articles 31 and 32 of the 1969 Vienna Convention, it was clear that subsequent agreements and subsequent practice had been identified as belonging in the general rule of interpretation precisely because they were an authentic means of interpretation. That did not mean that other means of interpretation were insignificant. The relationship between subsequent agreements and subsequent practice and other means of interpretation had already been dealt with in draft conclusions 1 and 2. Draft conclusion 3 was the place in the commentary where it was explained why subsequent agreements and subsequent practice, in particular, were relevant and how so.

Mr. Rajput said that to his mind there was a difference in meaning between the words “significant” and “relevant”, the latter of which did not denote more or less

significance and was therefore more appropriate. There was no need to overemphasize the role of subsequent agreements and subsequent practice in the introductory paragraph (1).

Sir Michael Wood proposed that, in the first sentence of the paragraph, the quotation marks around the phrase "authentic means of interpretation" might be better placed around the single word "authentic". He further proposed that the phrase "the reason why those means are significant for the interpretation of treaties" might be reworded to read "why they have an important role in the interpretation of treaties".

Mr. Nolte (Special Rapporteur) said that he would object to using, in the current sentence, the word "relevance" because it was also used in connection with article 32 of the 1969 Vienna Convention, on supplementary means of interpretation, whereas the sentence currently under discussion referred to the primary means of interpretation identified in article 31 of the Convention. With regard to the amendment proposed by Sir Michael Wood, the word "important" was equivalent to the word "significant" in the sentence in question; he could therefore accept the proposal.

Paragraph (1), as amended, was adopted.

Paragraph (2)

Paragraph (2) was adopted with some minor editorial amendments.

Paragraph (3)

Paragraph (3) was adopted.

Paragraph (4)

Mr. Park said that the reference to draft conclusion 9 should be replaced with a reference to draft conclusion 10.

Sir Michael Wood suggested replacing, in the first sentence, the word "character" with "characterization". In the third sentence, he proposed deleting the words "or legally binding", which might be confusing for readers.

Mr. Murphy said that similar language appeared in the first sentence of the paragraph. He would therefore propose deleting both occurrences of the phrase "or legally binding", unless Sir Michael Wood had a reason for wishing to retain the first.

Sir Michael Wood said that both instances of the phrase "or legally binding" should be deleted.

Mr. Nolte (Special Rapporteur) said that he agreed with the correction to the reference to draft conclusion 9 and also with the substitution of the word "character". As for the amendment proposed by Sir Michael Wood, the expression "conclusive, or legally binding" had been used by the Commission in the 1960s. In his view, there was no harm in retaining it in the current commentary.

Mr. Tladi said that he agreed with the proposal to delete the phrase "or legally binding". The agreements in question might well be legally binding between the parties, but might not be conclusive as to the interpretation of the treaty.

Mr. Park said that he would support maintaining the phrase "legally binding", which reflected the language of draft conclusion 10 (1).

Mr. Nolte (Special Rapporteur) said that, in the spirit of compromise, he would suggest deleting the words "legally binding" in the first instance and the words "conclusive or" in the second instance; in the latter case, the notion of conclusiveness was obvious from the reference to draft conclusion 10.

Paragraph (4), as amended, was adopted.

Paragraph (5)

Mr. Tladi said that the sentence beginning "Whereas Waldock's original view" should be deleted because, first, it was incorrect and, second, it contradicted the previous

paragraph, in which it was stated that subsequent agreements and subsequent practice were not necessarily conclusive. The sentence seemed to suggest that such agreements were conclusive as to the interpretation in that once a subsequent agreement had been reached between parties that they considered to be legally binding, that was the only thing that mattered for the purposes of interpretation; a legally binding agreement would therefore be conclusive. He did not agree with that line of thought.

Mr. Park said that the second sentence of the second part of the paragraph, starting with "It is, however," was not readily understandable. He suggested replacing the phrase "without satisfying" with the "that does not satisfy" and deleting the phrase "without such domestic law affecting, as a general rule, the binding character of an agreement under international law", which was unnecessary.

Mr. Rajput said that he would appreciate an explanation of the relevance of the second sentence to the first sentence of the paragraph.

Sir Michael Wood said that he supported Mr. Tladi's statement. The entire second part of the paragraph was unclear and went into unnecessary detail; he would therefore propose ending the paragraph after the block quotation by Sir Humphrey Waldock.

Mr. Murphy said he did not believe that the sentence describing "Waldock's original view" was correct: Sir Humphrey Waldock had not been arguing that agreed practice "would appear to be decisive". If the second part of the paragraph were to be retained, he would propose redrafting the beginning of the first sentence to read "Whereas Waldock's original view that subsequent practice establishing an agreement regarding interpretation", followed by the quote contained in the sentence as originally drafted. He further suggested replacing the word "must" with "may" throughout the second part of the paragraph. However, it would be far preferable for the Commission either to delete the second sentence or to delete both sentences that followed the quote by Sir Humphrey Waldock.

Mr. Nolte (Special Rapporteur) said that while he stood by the paragraph as originally drafted, he would agree to delete the part that followed the block quotation by Sir Humphrey Waldock; in his view, such an amendment would not change the substance of the paragraph as a whole.

Paragraph (5), as amended, was adopted.

Paragraph (6)

Mr. Rajput said that the first sentence gave the impression that, unless there was a specific reference within a treaty to the possibility of arriving at a binding subsequent interpretative agreement by the parties, there could be no such agreement. He therefore suggested replacing the phrase "particularly clear in cases in which the treaty itself so provides" with "expressly recognized in some treaties".

Mr. Nolte (Special Rapporteur) said that the words "particularly clear" indicated that it was possible in other cases. Therefore, he would prefer to keep the sentence as originally drafted.

Mr. Jalloh said that he supported the proposal by Mr. Rajput, which clarified the meaning of the first sentence.

Mr. Nolte (Special Rapporteur) said that he could live with the amendment proposed by Mr. Rajput, although he was not convinced by it.

Paragraph (6), as amended, was adopted.

Paragraph (7)

Sir Michael Wood said that in the first sentence the phrase "more or less authoritative" was unclear; he therefore proposed deleting the words "more or less".

Paragraph (7), as amended, was adopted.

Paragraphs (8) to (10)

Paragraphs (8) to (10) were adopted.

Paragraph (11)

Mr. Tladi said that, in the last sentence of the paragraph, the phrase "if they refer to, reflect or trigger" should be changed to "if they give rise to or reflect", consistent with the language contained in the relevant later draft conclusion.

Mr. Murphy said that the reference, in footnote 64, to draft conclusion 12 was not correct; it was draft conclusion 13 which contained the language "give rise to, or refer to.". He therefore suggested that the reference should be corrected and that the appropriate language should be used in the current paragraph.

Mr. Nolte (Special Rapporteur) said that, while it was true that draft conclusion 13 referred to treaty bodies and therefore contained relevant language, the last sentence of paragraph (11) referred not only to treaty bodies, but also to international courts and tribunals. The reason the verb "refer to" had been proposed originally was to tone down the significance of the pronouncements of treaty bodies; however, that was not appropriate with regard to the decisions of international courts and tribunals, whose judgments might reflect the identification of subsequent agreements and subsequent practice as authentic means of interpretation. Therefore, he would be in favour of adopting the language proposed by Mr. Tladi and referring to draft conclusions 12 and 13 in footnote 64.

Sir Michael Wood proposed that, in the third sentence, the word "rather" should be deleted and the words "most often" be replaced with "including".

The Chair said that the paragraph did not state that the authority of the courts derived from other sources; rather, it was the authority of interpretation by the courts that was at issue.

Mr. Murphy said that, while he understood the Special Rapporteur's position, he would suggest replacing the phrase "refer to, reflect or trigger" with "reflect, give rise to or refer to", to account for the pronouncements of international courts and tribunals, on the one hand, and expert treaty bodies, on the other.

The Chair said he took it that the Commission wished to adopt the amendments proposed by Sir Michael Wood relating to the third sentence of the paragraph and the latest amendment proposed by Mr. Murphy relating to the last sentence of the paragraph.

Paragraph (11), as amended, was adopted.

Paragraphs (12) and (13)

Paragraphs (12) and (13) were adopted.

The commentary to draft conclusion 3 as a whole, as amended, was adopted.

The meeting rose at 1 p.m.

Provisional

For participants only

12 October 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3445th meeting

Held at the Palais des Nations, Geneva, on Monday, 6 August 2018, at 3 p.m.

Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued)

Corrections to this record should be submitted in one of the working languages. They should be set forth in a memorandum and also incorporated in a copy of the record. They should be sent *within two weeks of the date of the present document* to the English Translation Section, room E.6040, Palais des Nations, Geneva (trad_sec_eng@un.org).

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Present:

<i>Chair:</i>	Mr. Valencia-Ospina
<i>later:</i>	Mr. Šturma (First Vice-Chair)
<i>Members:</i>	Mr. Cissé
	Ms. Escobar Hernández
	Ms. Galvão Teles
	Mr. Hassouna
	Mr. Huang
	Mr. Jalloh
	Mr. Laraba
	Ms. Lehto
	Mr. Murase
	Mr. Murphy
	Mr. Nguyen
	Mr. Nolte
	Ms. Oral
	Mr. Ouazzani Chahdi
	Mr. Park
	Mr. Peter
	Mr. Petrić
	Mr. Rajput
	Mr. Ruda Santolaria
	Mr. Saboia
	Mr. Tladi
	Mr. Vázquez-Bermúdez
	Mr. Wako
	Sir Michael Wood
	Mr. Zagaynov

Secretariat:

Mr. Llewellyn	Secretary to the Commission
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The meeting was called to order at 3 p.m.

Draft report of the Commission on the work of its seventieth session (continued)

Chapter IV Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy said that he wished to draw attention to an inconsistency in the final sentence, where there should be quotation marks around the words "subsequent practice".

The Chair said that the Secretariat would make the necessary editorial correction to that sentence and to any others where that problem occurred.

Mr. Nolte (Special Rapporteur) said that the Secretariat should check with him in each instance before making such corrections.

Paragraph (3) was adopted with a minor editorial change.

Paragraphs (4) to (7)

Paragraphs (4) to (7) were adopted.

Paragraph (8)

Mr. Murphy proposed that, in the first sentence, the word "squarely" should be deleted, since the case referred to in that sentence addressed the issue in a relevant way but did not do so "squarely".

Paragraph (8), as amended, was adopted.

Paragraph (9)

Mr. Murphy proposed that, in the first sentence, the words "may suggest" should replace the word "suggests", in order to make it clear that the Commission was not making an assertion that might not necessarily be correct.

Paragraph (9), as amended, was adopted.

Paragraph (10)

Sir Michael Wood said that the deletion of the words "their coincidental" in the first sentence would produce a more straightforward formulation.

Mr. Murphy said that, in paragraph (10), the Commission was referring to the possibility that different acts, when combined, could be viewed as an interpretation of a treaty. The two instances of the expression "common act" in the paragraph, however, appeared to exclude such a possibility. In order to avoid the implication that what was meant was a single common act or undertaking, he proposed to recast the first sentence so that it would read: "Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, through an undertaking or undertakings by the parties, or whether it is necessary to identify an agreement through practice that, in its coincidental combination, demonstrates an agreement." He also proposed that, in the second sentence, the words

"common act or undertaking" should be replaced with the words "undertaking or undertakings".

Mr. Park said that he was in favour of retaining the expression "coincidental combination" in the first sentence.

Mr. Nolte (Special Rapporteur) said that paragraph (10) concerned the distinction between subsequent agreements and subsequent practice. He had given considerable thought to its formulation, as had the Commission, and he would like to explain the reasons that had led him to use certain expressions. The word "coincidental" had been added partly in response to a concern expressed by Mr. Murphy in a different connection, where he had noted that subsequent practice could establish agreement, even though, in some cases, the parties were unaware of each other's parallel practice. The expression "common position" was taken from the *travaux préparatoires* of the 1969 Vienna Convention on the Law of Treaties. It was an expression that was used to describe the form of agreement that subsequent practice could generate and was therefore not an unusual one.

The distinction that Mr. Murphy was trying to draw between "undertaking" and "undertakings" was unclear. It was admittedly a difficult issue, and there were different ways of formulating it. If Mr. Murphy did not insist on his proposal, he would prefer to keep the text as it stood. However, he was willing to accept the deletion of the words "their coincidental" because the words "in combination" did, in a sense, imply the same thing. However, the word "coincidental" made it clearer that the combination in question was not preconceived, so he would prefer to retain it, if that was acceptable.

Mr. Murphy said that he was open to retaining the words "common position" and had no problem with "common understanding", provided that what was intended by those expressions was the agreement of all the parties. His concern had to do with the expression "common act or undertaking". That was because paragraph (10) referred to both subsequent agreement and subsequent practice: and because subsequent practice could be in the form of individualized practice that evidenced a particular interpretation but that was not common. His proposal to use the expression "undertaking or undertakings" was an attempt to ensure that the Commission was acknowledging that there might be subsequent practice in the form of individualized, and not common, conduct. He was open to other alternatives, but he did feel strongly about that aspect of the wording.

Mr. Nolte (Special Rapporteur) said that he wondered whether Mr. Murphy's concern might be addressed by using the expression "in a common act or undertaking". That would cover the case where States acted or expressed unilateral declarations in a coordinated fashion that amounted to a subsequent agreement — a process that was typically provided for in treaties or expected in connection with treaties. That would allow for retention of the expression "common act", which was the usual way of expressing a subsequent agreement, along with "common undertakings", which referred to bringing undertakings together in a coordinated way, while simultaneously remaining distinct from the coincidental way in which subsequent practice was produced to achieve a common understanding.

Sir Michael Wood said that the first part of the first sentence was correct and should be retained as it stood. The second part was obscure, however, because the word "coincidental" was ambiguous and had two possible meanings: happening by chance or happening at the same time. Accordingly, he proposed that, in the first sentence, "different acts" should be replaced with "separate acts" and the words "their coincidental" should be deleted, so that the clause would read "or whether it is necessary to identify an agreement through separate acts that, in combination, demonstrate a common position".

Mr. Murphy said that he was open to Sir Michael Wood's proposal for the second part of the first sentence, but the point being made in the first part related to the North American Free Trade Agreement (NAFTA) example that had just been discussed in paragraph (8): the point was that different acts or undertakings could be put together to establish the existence of a subsequent agreement. His concern was that the expression "a common act or undertaking", in which both nouns were in the singular, implied that the establishment of a subsequent agreement was limited to a situation involving a single instrument, which was not the case.

Mr. Nolte (Special Rapporteur) said that he could live with Sir Michael Wood's proposal, although it removed a little of the clarification that was intended. Mr. Murphy's reference to the NAFTA case was not entirely accurate because the quote in paragraph (8) referred not to a subsequent agreement but to an agreement based on the subsequent practice of different actors, which had arisen through different, coincidental or fortuitous acts. The expression "common act or undertaking" was therefore correct. He would be in favour of adopting the paragraph with the amendments proposed by Sir Michael Wood.

The Chair invited the Secretary to read out the text with the proposed amendments.

Mr. Llewellyn (Secretary to the Commission) said it had been proposed that the first sentence should be amended to read: "Subsequent agreements and subsequent practice under article 31, paragraph 3, are hence distinguished based on whether an agreement of the parties can be identified as such, in a common act or undertaking, or whether it is necessary to identify an agreement through separate acts that in combination demonstrate a common position."

Mr. Nolte (Special Rapporteur) said that it was his understanding that the second sentence of the paragraph should remain unchanged.

Mr. Murphy said he wished to clarify whether all Commission members were in agreement that a common act or undertaking could take the form of multiple instruments, as indicated, for example, in the last sentence of footnote 88, which read: "A common act may consist of an exchange of letters." If that was the case, then he would like to propose the insertion of a footnote to the first sentence, where the expression "common act or undertaking" appeared, to clarify how the Commission viewed the concept of a common act, since it obviously did not view it as a single act. The footnote could read: "A common act or undertaking may consist of an exchange of letters or some other form of agreement."

Mr. Nolte (Special Rapporteur) said that he agreed with the inclusion of the proposed footnote. However, the idea expressed in the footnote was that an exchange of letters could constitute a subsequent agreement: since the second sentence was the one that explained what a subsequent agreement was, he would prefer to have the footnote placed at the end of that sentence, which was also the end of the paragraph.

The Chair said he took it that the Commission wished to adopt Sir Michael Wood's proposal for the second part of the first sentence and to include Mr. Murphy's proposed footnote, with the footnote indicator inserted at the end of the paragraph.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Paragraph (11) was adopted.

Paragraph (12)

Mr. Park said that he proposed to delete the word "single" in the first and final sentences, as the Special Rapporteur had done in other parts of the text.

Mr. Murphy said that the words "single agreement" made sense in the second sentence because the point being made was that, although it was possible among a group of States parties to have subsets of parties reaching agreements on the interpretation of the treaty, those individualized agreements did not constitute a single agreement of all the parties to the treaty. However, in the final sentence, the formulation "limited to agreements among all the parties to a treaty that constitute one single agreement" was very confusing. He proposed to simplify the final sentence by amending it to read: "Thus, the use of the term 'subsequent agreement' is limited to an agreement among all the parties to the treaty." That formulation was a direct statement of what the Commission intended and was a good summary of what had been stated previously in the paragraph.

Sir Michael Wood proposed the deletion of the paragraph, as he found it to be complicated and dogmatic, and he wondered whether the Commission should be

committing itself to all the propositions it contained. He did not see that much, if anything, would be lost by its deletion.

Mr. Nolte (Special Rapporteur) said that, in the case of a treaty with many parties, the conclusion of various separate agreements between a limited number of States parties did not constitute a subsequent agreement that established the agreement of all the parties. That was a pretty straightforward proposition and was neither doctrinal nor dogmatic.

In light of the discussion on paragraph (10), and in order to address Mr. Park's concern, he proposed that, in the second sentence, the words "single agreement" should be replaced with "common act or undertaking". With regard to the final sentence, he proposed the deletion of the words "that constitute one single agreement — or", so that the end of the sentence would read "among all the parties to a treaty in a common act in whatever form that reflects the agreement of all parties". That formulation would also meet Mr. Murphy's concern and would be consistent with what had been decided with regard to paragraph (10).

Mr. Saboia said that he, too, considered that paragraph (12) could be deleted. However, he would not insist on its deletion if the Special Rapporteur wished to retain it.

Mr. Rajput said that, given that the Commission was speculating as to whether a subsequent agreement was limited to a single agreement or could result from more than one agreement, the possibility existed that it might not be limited to a single agreement. Therefore, one good compromise that would reconcile Mr. Park's and Mr. Murphy's respective views might be to rephrase the final sentence so that it would read: "Thus, the use of the term 'subsequent agreement' is limited to an agreement among all the parties to a treaty or in a common act in whichever form reflects the agreement of all parties." He agreed, however, with Mr. Murphy's point about retaining the existing wording in the second sentence.

Mr. Murphy said that he would have no problem with deleting the paragraph; however, if the Commission decided to retain it, he was opposed to reintroducing the expression "common act or undertaking" in the second sentence. What the Commission was trying to convey was that multiple agreements were not good enough, but a single agreement was good enough. It was therefore clouding the issue to then start contrasting the idea of multiple agreements with a common act or undertaking. He agreed with Mr. Rajput's proposal to delete the phrase "that constitute one single agreement —", but he would simply place a full stop after the phrase "an agreement among all the parties to a treaty", as it adequately captured the Commission's point.

Sir Michael Wood said that he did not understand why the assertion made in the first sentence should be accepted as true; nor did he understand what was meant by the word "normally" in that sentence. The second sentence was equally difficult, and he did not see why the assertion made in it should be accepted as true either. Those statements appeared to come out of nowhere, and he could not see the point of the paragraph.

Mr. Nolte (Special Rapporteur) said that the point being made in the paragraph was that a group of separate subsequent agreements between a limited number of parties to a treaty could not establish an agreement between all the parties. The replacement of the phrase "single agreement" in the second sentence with "common act or undertaking" should resolve all problems. It was the purpose of the commentary to address that possibility, which existed in practice; it was not doctrinal speculation.

Mr. Murphy said that, as he saw it, the Commission was claiming that individual agreements concluded among different groups of parties to a treaty, which, taken together established the agreement of all the parties on the interpretation of the treaty — thus, even if all the parties were "in play", so to speak — still did not constitute a subsequent agreement. Sir Michael Wood's question had been "why not?". His own question was whether that claim was correct.

Mr. Nolte (Special Rapporteur) said that the reason why the word "normally" had been included in the first sentence was that paragraph (12) elaborated on paragraph (10). Different acts which, in combination, demonstrated a common position could be a form of subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention, whereas

individual agreements reached among a limited number of parties at different points in time would not constitute a subsequent agreement under article 31 (3) (a) of the Convention.

Mr. Rajput said that the speculative nature of the paragraph might come back to haunt the Commission, because no instances of treaty practice, or any other practice, were cited in support of it. The only case law cited was that mentioned in footnote 88. He was therefore somewhat concerned that, if the paragraph was retained, the Commission might have trouble justifying it in the future, or that it might even hinder possible future development that was contrary to it. It should therefore be deleted.

Mr. Nolte (Special Rapporteur) said that the paragraph, which was virtually the same as that adopted on first reading, had already been scrutinized by the Commission. However, he suggested that it should be held in abeyance while he held informal consultations with several members.

It was so decided.

Paragraph (13)

Sir Michael Wood suggested that, in the first sentence, "must be" should read "is" and that, in the second sentence, the word "purport" should be replaced with "intend".

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Rajput said that he was curious about the practice of referring to separate opinions of judges, especially when they were essentially dealing with facts. He was unsure whether the last two sentences really fitted into the text. He wondered if the Special Rapporteur would be amenable to deleting them.

Mr. Nolte (Special Rapporteur) said that he would agree to move the last two sentences to footnote 91, on the understanding that the Commission did not make a habit of shifting parts of a commentary to a footnote.

Paragraph (14), as amended, was adopted.

Paragraphs (15) to (18)

Paragraphs (15) to (18) were adopted.

Paragraph (19)

Mr. Murphy said that the last two sentences of the paragraph made odd claims about the manner of thinking about subsequent practice. It was not obvious that any subsequent practice should necessarily be regarded as being in good faith. Nor was it obvious how manifest misapplication was to be determined. As those two sentences raised more questions than they answered and were not germane to the basic point made in the paragraph, they should be deleted.

Sir Michael Wood said that he agreed with Mr. Murphy and noted that no authorities had been given for those two sentences. In the preceding sentence, the term "national legislation" should be replaced with "internal legislation" for the sake of consistency with the earlier reference to "internal law".

Mr. Rajput said that, while he agreed with the Special Rapporteur that an element of good faith was implied in subsequent practice, it would have been helpful if a reference to *international jurisprudence* had been added at the end of the sentence to buttress that position.

Mr. Nolte (Special Rapporteur) said that it was surprising that a reference to case law should be requested for such an obvious statement. It went without saying that treaties should be applied in good faith. The purpose of the sentence, which had been approved on first reading, was to reduce the possibility that States might attempt to interpret a treaty on the basis of a manifest misapplication thereof. There had to be a limit to what a State could

term an application of a treaty, and the expression "manifest misapplication" was therefore apt in the context. For that reason, he saw no reason to delete the last two sentences.

Mr. Murphy said that he could agree to wording along the lines of "States parties, when applying a treaty, must act in good faith" in the penultimate sentence. However, what the sentence actually suggested was that, whenever a State was acting in the application of a treaty, good faith must be implied. He considered that to be wrong. He appreciated the Special Rapporteur's explanation of the following sentence, but it still did not clarify who or what could decide that there had been manifest misapplication.

Mr. Rajput said that he saw Mr. Murphy's point. His concern might be addressed by replacing "an element of good faith is implied" with "an element of good faith is necessary".

Sir Michael Wood said the last two sentences suggested that there was some argument to be advanced regarding good faith. For example, in *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, South Africa could have argued that the accepted interpretation of Article 27 of the Charter of the United Nations was in bad faith because it was obviously wrong. The Court had, however, found that that interpretation had been accepted for many years and therefore evidenced general practice. For that reason, the reference to good faith in the commentary was not helpful.

Mr. Nolte (Special Rapporteur) said that, in the case cited by Sir Michael Wood, South Africa had not argued that all other States were manifestly misapplying the Charter or that they were acting in bad faith. A better example would be needed to call those two sentences into question. He would be grateful if the current exercise was not turned into a debate where the Special Rapporteur had to demonstrate and prove yet again that two sentences which had already been approved by the Commission made sense.

The Chair said that the Special Rapporteur's concern was understandable. As the commentaries had already been adopted by the Commission on first reading and had been submitted to States, which had not reacted to some of the points raised in the current debate, there should be an assumption that the commentaries reflected a position on which all members had agreed.

Mr. Park said that he supported the position of the Special Rapporteur in the light of paragraph (2) of the commentary to draft conclusion 5.

Mr. Tladi said the fact that the Commission had adopted the commentary on first reading was not a reason not to take a close look at it again. The Commission wished to adopt the best possible product. If there was something that it had missed on first reading, it should reopen the debate in order to improve the text.

Mr. Nolte (Special Rapporteur) said that he was simply asking the Commission to abide by its own procedure. The text had not only been adopted on first reading; the topic had followed the Commission's classic, traditional procedure of adoption of the individual draft conclusions with commentary followed by their submission to States for their consideration. States had had three opportunities to comment on or object to the draft conclusions and commentary thereto. He agreed with Mr. Tladi that in principle any point could be raised for discussion until the final adoption of the text, but the text had already been examined by almost all the members who had taken part in the debate on the topic in 2016.

Mr. Murphy said that he agreed with Mr. Tladi that the goal was to have the best possible commentaries. The Special Rapporteur had made six changes to the paragraph adopted on first reading, none of which were based on Governments' reactions. He had done a fine job in seeking to improve on the text approved two years earlier: all those members who were contributing to the current debate were simply trying to do the same. He hoped that the Special Rapporteur was at least open to the amendment proposed by Mr. Rajput, because it captured the idea that States must act in good faith.

The Chair said he took it that the Commission wished to replace "an element of good faith is implied" with "an element of good faith is necessary", and "national legislation" with "internal legislation".

It was so decided.

Paragraph (19), as amended, was adopted.

Paragraph (20)

Mr. Murphy suggested that the beginning of the first sentence should read: "The requirement that subsequent practice in the application of a treaty under article 31, paragraph 3 (b), must establish an agreement 'regarding its interpretation'..."

Paragraph 20, as amended, was adopted.

Paragraph (21)

Mr. Ouazzani Chahdi questioned the use of the word "*envisagée*" in the French version of the text.

The Chair proposed that the French translation service should be requested to find a more appropriate term.

Paragraph (21) was adopted on that understanding.

Paragraph (22)

Paragraph (22) was adopted.

Paragraph (23)

Sir Michael Wood said that, at the end of the second sentence, "[1]" should be deleted. In the third sentence, for the sake of clarity, the phrase "to the draft articles on the law of treaties" should be inserted after "the commentary of the Commission". In the editorial intervention in square brackets in the third sentence of the quotation, "of what became" should read "which became".

Paragraph (23), as amended, was adopted.

Paragraph 24

Sir Michael Wood said that, in the first line, it would be neater to replace "as it is contained in" with "as does".

Mr. Murphy said that he understood that sentence to mean that paragraph 3 did not enunciate some kind of new requirement, because it was already contained in article 31 of the 1969 Vienna Convention, whereas the amendment suggested by Sir Michael Wood seemed to say something different. He wondered if it would be possible to delete the beginning of the sentence and to start with the phrase "Article 31, paragraph 3 (b), provides that the relevant practice ...". The next sentence would then begin "Thus, for the purposes of the third paragraph of draft conclusion 4".

Mr. Nolte (Special Rapporteur) agreed with the amendment proposed by Sir Michael Wood, because the purpose of that section of the commentary was to explain subsequent practice under article 32 and article 31 (3) of the 1969 Vienna Convention. It therefore made sense to say, in an introductory sentence, that paragraph 3 did not include a requirement that was already contained in article 31 (3) of the Convention.

Sir Michael Wood said that, in that case, it would be clearer to say "Paragraph 3 of draft conclusion 4 does not contain a requirement like that in article 31, paragraph 3 (b)".

Paragraph (24), as amended, was adopted.

Paragraph (25)

Sir Michael Wood suggested deleting the first word, "This". Noting that, after the quotation, the paragraph referred to the jurisprudence of the World Trade Organization (WTO) Dispute Settlement Body, he said it might be preferable to replace the words "and ultimately even", which seemed rather harsh, with "including".

Mr. Nolte (Special Rapporteur) said the reason for the wording "ultimately even" was to be found in paragraphs (33) and (34) of the commentary to draft conclusion 4: initially, the WTO Dispute Settlement Body had not recognized that subsequent practice which fulfilled all the conditions under article 31 (3) (b) of the 1969 Vienna Convention was not the only form of subsequent practice by parties in the application of a treaty that might be relevant for the purpose of treaty interpretation, but ultimately it had done so.

Mr. Rajput said that in order to maintain the original thrust of the sentence, it might be advisable simply to delete "and ultimately".

Mr. Murphy said that the amendment suggested by Sir Michael Wood was a good one. The text had not yet dealt with the determinations of the WTO Dispute Settlement Body. The erroneous impression was therefore created that the Commission was saying something about the status of WTO *vis-à-vis* the International Court of Justice, as though there was something strange about WTO. He would therefore be in favour of deleting the word "itself".

Mr. Nolte (Special Rapporteur) said that it was necessary to explain the reference to the WTO Dispute Settlement Body at that point in the text and to make it plain that its jurisprudence was relevant to the discussion of subsequent practice, although at first that might not seem to be the case. Mr. Rajput's suggestion was a helpful compromise. He could agree to the deletion of "itself", if Mr. Rajput's suggestion was retained.

Paragraph (25), as amended, was adopted.

Paragraph (26)

Paragraph (26) was adopted.

Paragraph (27)

Mr. Park suggested the deletion of the word "State" in the first sentence.

Mr. Rajput, supported by **Mr. Saboia**, said that the paragraph dealt with the very serious issue of whether minority shareholders could file claims in an investment arbitration case. The accepted position was that the admissibility of such claims depended on the treaty itself. Paragraph (27) tried to contend that it had become State practice to allow such claims, whereas paragraph 48 of the decision of the International Centre for the Settlement of Investment Disputes in *CMS Gas Transmission Company v. the Republic of Argentina* indicated that minority shareholder claims were allowed under specific treaty arrangements. Paragraph (27) therefore contradicted some highly specialized jurisprudence and should be deleted for that reason.

Mr. Nolte (Special Rapporteur) said that Mr. Rajput and Mr. Saboia were referring to a highly controversial substantive issue, but paragraph (27) merely said that State practice in the area of investment disputes had been used as a means of interpretation. That did not prejudice the outcome of any such dispute. He would be happy to include a reference in the footnote to paragraph 48 of the aforementioned decision, which did not contradict the contents of paragraph 47 thereof. He could agree to the deletion of "State" in the first line, although it had been included because the quotation started with the term "State practice". He would prefer to retain the paragraph, as he failed to understand why it created difficulties.

Mr. Rajput said he felt very strongly that the paragraph should be deleted, because the case in question did not really turn on subsequent agreements or subsequent practice. In the paragraph quoted, the Tribunal had made an off-the-cuff remark about an apparent practice. Anyone who wanted to seek guidance on subsequent practice or subsequent agreements was going to use the Commission's product. For that reason there was a

possibility that the paragraph quoted by the Special Rapporteur could be used to argue that subsequent practice existed to the effect that even minority shareholders had rights, despite substantial jurisprudence to the contrary. The Commission would therefore be creating a very tricky situation with which some States and tribunals would not be comfortable.

Mr. Nolte (Special Rapporteur) said that he was concerned that, if a case was quoted where subsequent practice played a role in interpretation, every member who disliked the outcome of the case could refuse to have it cited, because it might support a particular position. That would be a dangerous precedent. However, he was prepared to delete the paragraph on an exceptional basis, despite the fact that it was fully justified and did not prejudice the Commission's position on whether minority shareholders had rights. Whether or not that was the case depended, of course, on the investment treaty in question.

Paragraph (27) was deleted.

Paragraphs (28) and (29)

Paragraphs (28) and (29) were adopted.

Paragraph (30)

Mr. Jalloh suggested that, in the first sentence, the word "under" should be changed to "established by" in line with the wording of the International Covenant on Civil and Political Rights, to which reference was made.

Paragraph (30), as amended, was adopted with a minor editorial change.

Paragraph (31)

Sir Michael Wood queried whether the example of the *MV "SAIGA" (No. 2)* (*Saint Vincent and the Grenadines v. Guinea*) case given in paragraph (31) was wholly relevant to the definition of subsequent practice under article 32 of the 1969 Vienna Convention on the Law of Treaties, on which paragraph 3 of draft conclusion 5 focused. The law on the use of force, referred to by the International Tribunal for the Law of the Sea in that case, was part of customary law, not a provision of the United Nations Convention on the Law of the Sea. As such, the Tribunal had not used subsequent practice in the application of that treaty in the interpretation thereof.

Mr. Nolte (Special Rapporteur) said that the reference in the Tribunal's judgment to "normal practice used to stop a ship" appeared to concern practice under the Convention in question. As not all States had had occasion to stop ships, it probably did not reflect the practice of all parties thereto, but it would constitute practice under article 32 of the 1969 Vienna Convention. If the term "use of force" gave cause for concern, alternative wording might be found.

Ms. Oral recalled that, as the Tribunal had noted in its judgment in the *MV "SAIGA" (No. 2)* case, the Convention on the Law of the Sea contained no express provisions on the use of force in the arrest of ships, but that international law, applicable under article 293 of the Convention, required that the use of force must be avoided as far as possible.

Sir Michael Wood suggested that the Tribunal had applied other rules of international law, as it was permitted to do under article 293 of the Convention, and that the practice therefore related not to the Convention but to customary international law.

Mr. Rajput, echoing Sir Michael Wood's comments, said that some scholars had seen the case as concerning domestic practice of States in the exercise of policing powers, rather than international practice under treaties, and asked how the Special Rapporteur intended to address both that point.

Mr. Murphy, drawing attention to article 301 of the Convention on the Law of the Sea on the peaceful uses of the seas, which stipulated that States parties to the Convention should refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations, said that, in relation to the *MV "SAIGA" (No. 2)* case, the salient point was whether the Tribunal had been

interpreting that article or seeking an alternative source of law, as permitted under article 293; if the latter, Sir Michael Wood's point stood.

Mr. Tladi said that Ms. Oral's explanation confirmed Sir Michael Wood's point.

Mr. Nolte (Special Rapporteur) acknowledged that the matter was not clear cut, although he believed the Tribunal had been applying the Convention on the Law of the Sea, which in a sense incorporated other international law; however, in the interests of compromise, the paragraph could be deleted.

Paragraph (31) was deleted.

Paragraph (32)

Paragraph (32) was adopted.

Paragraph (33)

Sir Michael Wood expressed doubt about the relevance of the quotation in paragraph (33) to article 32 of the 1969 Vienna Convention.

The Chair said that, in the absence of any other comments, he took it that the Commission agreed to retain the paragraph as drafted.

Paragraph (33) was adopted with a minor editorial change.

Paragraphs (34) to (37)

Paragraphs (34) to (37) were adopted.

Commentary to draft conclusion 5 (Conduct as subsequent practice)

Paragraphs (1) and (2)

Paragraphs (1) and (2) were adopted.

Paragraph (3)

Mr. Murphy said that, as drafted, the paragraph might lead to a misinterpretation of the position taken by the International Court of Justice in the case concerning *Kasikili Sedudu Island (Botswana/Namibia)* with regard to whether the conduct of a local tribe could in itself constitute subsequent practice in the application of a treaty, which was not the case. To make the Court's position entirely clear, he suggested that, in the first sentence, the phrase "constitutes an example of State practice" should be replaced with "can be relevant for determining subsequent practice", and "has been identified by the International Court of Justice" with "may be seen". He also suggested that, in the second sentence, the words "relevant when identifying" should be inserted after "could be regarded as".

Mr. Nolte (Special Rapporteur) said that he could accept the amendments to the first sentence suggested by Mr. Murphy, but that his amendment to the second would dilute the Court's ruling to an unacceptable degree.

Mr. Rajput suggested that the first sentence could be altered to read: "In certain situations, relevant conduct that does not directly arise from the conduct of the parties, may constitute an example of State practice, as has been identified by the International Court of Justice in the *Kasikili Sedudu Island* case."

Mr. Murphy, expressing the view that Mr. Rajput's suggestion would not provide the necessary clarification, said that he welcomed the Special Rapporteur's acceptance of his suggested amendments to the first sentence but wished to emphasize that his proposed amendment to the second had merely been intended to clarify the Court's position that the conduct of the local tribe did not constitute subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention without a belief on the part of the authorities of one party, accepted by the authorities of the other, that such conduct confirmed the boundary between them established by treaty.

Sir Michael Wood said that the current wording of the first part of the paragraph seemed to place too great an emphasis on the distinction between the conduct of the local tribe and the endorsement of that conduct by one of the parties. He suggested that it should be changed to: "An example of relevant conduct that arises only indirectly from the conduct of the parties, but nevertheless gives rise to State practice, has been identified ..."

Mr. Jalloh, expressing support for Mr. Murphy's remarks, said that the commentary should be amended to reflect the comments received from the Government of the United States of America, which claimed that the Commission had misread the Court's judgment in the *Kasikili Sedudu Island* case. Sir Michael Wood's suggested change would also improve the paragraph.

Mr. Tladi said that, as the case was relied upon heavily in the commentary, it was particularly important to reflect the Court's position clearly and faithfully. He could accept either the suggestions made by Mr. Murphy or Sir Michael Wood's proposal, though in the latter case he would prefer the words "gives rise to" to be altered to "might give rise to".

Mr. Saboia said that he could accept Sir Michael Wood's proposal. With regard to Mr. Jalloh's point, observations made by States after the first reading of a text did not oblige the Commission to change it; the final decision rested with the Commission, informed by the Special Rapporteur for the topic. The *Kasikili Sedudu Island* case was undoubtedly relevant in the context; similar situations might be identified in relation to indigenous peoples in the Americas enjoying a certain legal status. In that respect, he supported the position of the Special Rapporteur.

Mr. Nolte (Special Rapporteur), emphasizing the need to take a broader view, said that, read as a whole, the paragraph accurately reflected the Court's position in the *Kasikili Sedudu Island* case. Mr. Murphy's second suggested amendment introduced an element that was not present in the Court's reasoning. In order not to prolong the debate further, he suggested that the paragraph could be adopted with the amendment suggested by Sir Michael Wood, as further altered by Mr. Tladi.

Mr. Jalloh expressed support for that course of action, in view of the Special Rapporteur's explanation.

Mr. Murphy said that Sir Michael Wood's suggestion seemed an acceptable basis on which to move forward; however, the link to the second part of the paragraph still required further clarification. It was essential to avoid any implication that the conduct of the local tribe could be regarded as subsequent practice in and of itself.

The Chair suggested that altering the words "the Court considered that" in the second sentence of the paragraph to "the Court considered whether" might meet that concern.

Mr. Murphy, supported by **Mr. Jalloh**, said that such an approach would be acceptable, though additional changes would be needed to ensure a correct grammatical structure.

Mr. Nolte (Special Rapporteur) suggested that changing the words "if it", which introduced the quotation, to "and found that this would be the case if it" might serve that purpose.

Mr. Murphy instead suggested ending the second sentence after the words "Vienna Convention" and replacing "if it" with "The Court concluded that subsequent practice could only be found if such conduct".

Mr. Nolte (Special Rapporteur) said that the words "could only be found" did not accurately reflect the Court's judgment. He suggested that Mr. Murphy's structural change could be adopted if the words "if it" were changed to "The Court found that this would be the case if it".

Mr. Murphy said that such wording might still imply that the conduct of the local tribe constituted subsequent practice under article 31 (3) (b) of the 1969 Vienna Convention.

Ms. Oral suggested that the insertion of an explanatory footnote might clarify the matter for the general reader.

Mr. Murphy further suggested amending his earlier proposal so that the second sentence would end at "Vienna Convention" but the words "if it" would be replaced with "The Court concluded that subsequent practice could be found if such conduct".

Mr. Nolte (Special Rapporteur) agreed to that suggestion.

The Chair said he took it that the Commission agreed to amend paragraph (3) in line with the suggestion made by Sir Michael Wood, as further amended by Mr. Tladi, and the last suggestion made by Mr. Murphy.

It was so decided.

Mr. Ouazzani Chahdi said that, in the French version of paragraph (3), the verb "*estimer*" would better reflect the English word "consider" than "*juger*", which implied a judicial ruling.

Mr. Nolte (Special Rapporteur) said that, taking account of the amendments made to the English version of the text, the existing French terminology seemed appropriate.

Paragraph (3), as amended, was adopted.

Paragraphs (4) to (9)

Paragraphs (4) to (9) were adopted.

Paragraph (10)

Mr. Murphy, referring to the third sentence, proposed that the words "the possibility" should be inserted after the word "exclude" and that a new sentence break should be inserted after the words "functions of a State party". That second proposal would require the words "a State party may be" to be inserted after "For example" at the beginning of the new, fourth sentence.

Mr. Nolte (Special Rapporteur) said that, although he agreed with the second of Mr. Murphy's two proposals, he felt the first would overburden the text.

The Chair said he took it that the Commission wished to accept only the second of Mr. Murphy's two proposals.

It was so decided.

Paragraph (10), as amended, was adopted.

Paragraph (11)

Mr. Murphy proposed deleting the words "practice of parties that is not 'in the application of the treaty' or" in the second sentence, as the Commission did not view "other conduct" as including such practice. In addition, as the Commission had decided, in draft conclusion 13, that it was not addressing the question of whether pronouncements of expert treaty bodies constituted conduct within the scope of the topic, he proposed that the words "or a pronouncement by an independent treaty monitoring body in relation to the interpretation of the treaty concerned" should also be deleted.

Mr. Nolte (Special Rapporteur) said that he did not agree with Mr. Murphy that practice of parties that was not "in the application of the treaty" was excluded from the topic. The title of the topic did not support that interpretation. He also did not agree that the Commission had excluded pronouncements of expert treaty bodies from the scope of the topic. They were indirectly relevant, as they could give rise to, or refer to, subsequent practice. Indeed, the judgment of the International Court of Justice in the *Ahmadou Sadio Diallo* case was quoted in the commentary to draft conclusion 13. Draft conclusion 5 did not stipulate that "other conduct" was not relevant, but merely that it did not constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention.

Sir Michael Wood said that he agreed with the Special Rapporteur's explanation. In the context, it was perfectly correct to include a reference to pronouncements by independent treaty monitoring bodies. The current text of the paragraph was acceptable.

Mr. Jalloh said that he agreed with the Special Rapporteur that the pronouncements of expert treaty bodies had not been excluded from the scope of the topic and the reference to them should not be deleted.

Mr. Murphy, supported by **Mr. Rajput**, said that, although his personal view was that practice that was not "in the application of the treaty" was not relevant to the interpretation of the treaty, the Commission had not expressed a view on that point. As paragraph 2 of draft conclusion 5 stated that "other conduct" might be relevant when assessing the subsequent practice of parties to a treaty, practice of parties that was not "in the application of the treaty" should not be cited in the commentary as an example of such "other conduct". With regard to independent treaty monitoring bodies, the Commission had decided that the matter would be dealt with in a "without prejudice" clause.

Sir Michael Wood said that the "without prejudice" clause in draft conclusion 13 (5) applied only to that draft conclusion. Draft conclusion 5 (2) made it clear that, although "other conduct" did not constitute subsequent practice under articles 31 and 32 of the 1969 Vienna Convention, it might be relevant when assessing the subsequent practice of parties to a treaty. Pronouncements by independent treaty monitoring bodies could be very relevant, as they stimulated practice.

Mr. Tladi said that he agreed with Sir Michael Wood and Mr. Jalloh.

Mr. Šturma said that he shared the views of Sir Michael Wood, Mr. Jalloh and the Special Rapporteur. The reference to pronouncements by international treaty monitoring bodies was fully appropriate in the context.

Mr. Jalloh said that, in his view, the interpretation given by the Special Rapporteur and Sir Michael Wood was the correct one. He would urge the Commission to accept it.

Paragraph (11) was adopted.

Mr. Šturma, First Vice-Chair, took the Chair.

Paragraph (12)

Mr. Murphy proposed that the words "may only contribute to" in the last sentence should be replaced with "may only be relevant when" in order to reflect the language used in paragraph 2 of draft conclusion 5.

Mr. Nolte (Special Rapporteur) said that, if the Commission wished to accept Mr. Murphy's proposal, the word "only" should be deleted as well.

Mr. Rajput said that he saw no need to amend the original text.

Mr. Murphy said that the Commission had not used the words "contribute to" in draft conclusion 5 (2). He would not insist on keeping the word "only", although it did clarify the connection with the previous sentence.

Sir Michael Wood proposed that the words "may only contribute to" should be replaced with the exact language used in draft conclusion 5 (2), namely the words "may, however, be relevant when".

Paragraph (12), as amended, was adopted.

Paragraph (13)

Mr. Murphy proposed that, in order to bring the text of the third sentence into line with the agreed language of draft conclusion 5, the words "may be indicative of relevant practice" should be replaced with "may be relevant when assessing the subsequent practice".

Mr. Nolte (Special Rapporteur) said that he was prepared to grant Mr. Murphy that concession.

Paragraph (13), as amended, was adopted.

Paragraph (14)

Mr. Murphy proposed that, in the first sentence, the words "may enjoy authority in the assessment of such practice" should be replaced with "may be useful in identifying such practice", as it was the interpretation of a report of an international organization, rather than the report itself, that might enjoy authority in the assessment of State practice in a particular field.

Mr. Rajput said that another alternative would be to use the words "may be useful in the assessment of such practice".

Mr. Jalloh said that a form of the verb "assess" should be used, as it was used in draft conclusion 5 (2).

Sir Michael Wood proposed that, in order to bring the first sentence into line with the Commission's earlier work, in particular the 1975 Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, the term "international organizations at the universal level" should be replaced with "international organizations of a universal character".

Mr. Nolte (Special Rapporteur) said that, while he could accept Sir Michael Wood's proposal, he was reluctant to accept Mr. Murphy's. The first sentence stated only that reports by international organizations might enjoy authority "in the assessment" of State practice in a particular field. That was a sufficiently cautious way of reflecting the reality of the situation. He would prefer to retain the original formulation.

Mr. Rajput said that the word "authority" was the source of the problem. The Commission had not used that word in relation to independent treaty monitoring bodies in paragraph (11). In his view, Mr. Murphy's proposal would ensure that excessive weight was not attached to reports by international organizations.

Ms. Lehto said that she agreed with the Special Rapporteur's reasoning. An appropriate degree of caution was already ensured by the use of the word "may".

Mr. Saboia said that he supported the paragraph as it was currently drafted. The authority of a report by an international organization derived ultimately from the mandate on the basis of which it had been prepared. As Mr. Rajput had noted, the Commission had taken a different approach towards independent treaty monitoring bodies in paragraph (11). In his view, pronouncements by such bodies might enjoy authority in the assessment of State practice in a particular field. In relation to the term "international organizations of a universal character", he would appreciate clarification regarding where the use of that term would leave regional organizations, whose work was often cited by the Commission.

Mr. Jalloh said that he was persuaded by the arguments advanced by the Special Rapporteur, Ms. Lehto and Mr. Saboia. In his view, the current text of the paragraph was acceptable. Although he could see the merit of Sir Michael Wood's proposal to use the term "international organizations of a universal character", he, too, wondered about the work of regional organizations. He could see no reason for excluding relevant articles of the Constitutive Act of the African Union, for example, from an assessment of the practice of African States in specific contexts, such as the use of force or the duty to protect. For that reason, he wondered whether reference could not be made to the work of regional organizations.

Mr. Murphy said that the intention of his proposal had been to clarify that it was the interpretation of a report of an international organization that might enjoy authority in the assessment of State practice in a particular field. He had not been seeking to downplay the relevance of such reports. If the Commission wished to retain the word "authority", one solution might be to replace the words "in the assessment of" with "when assessing", which would ensure continuity with previous paragraphs of the commentary and the draft conclusion itself.

Sir Michael Wood said that, like Mr. Rajput, he found the word "authority" problematic. The Commission could certainly claim that reports by international organizations might be important when assessing State practice in a particular field, but the question of their authority was a separate one. He proposed that the words "may enjoy

authority in the assessment of such practice" should be replaced with "may be very important when assessing such practice".

The Chair said that another alternative would be to use the words "may play an important role in assessing".

Mr. Nolte (Special Rapporteur) said that he could accept Mr. Murphy's proposal to replace the words "in the assessment of" with "when assessing". With regard to the point raised by Mr. Rajput and Sir Michael Wood, his suggestion would be to qualify the word "authority" with the adjective "persuasive", which would indicate that reports by international organizations enjoyed an authority that was less than binding. With regard to the question of regional organizations, it would be possible to refer simply to "international organizations", rather than to "international organizations at the universal level" or "international organizations of a universal character", so that regional organizations would also be included.

Sir Michael Wood said that he was prepared to accept the proposal to refer simply to "international organizations". However, he was more reluctant to accept the insertion of the adjective "persuasive", as the expression "persuasive authority" suggested a certain legal or technical authority. There had been numerous cases in the English courts in which the question of the status of the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* had been discussed. By claiming that reports by international organizations might enjoy "persuasive authority", the Commission would be purporting to decide that question. He proposed that the words "may enjoy authority in the assessment of" should be replaced with "may be very important when assessing".

Mr. Jalloh said that, in his view, the use of the word "may" in the original text already reflected a sufficient degree of caution. He agreed with the decision to refer to "international organizations" generally rather than to those of a universal character specifically.

Mr. Saboia said that the phrase "may have weight when assessing" was another alternative.

Mr. Zagaynov said that, with regard to the word "authority", a good middle ground could be found in the proposals made by Sir Michael Wood and the Chair.

Mr. Park said that he supported Sir Michael Wood's proposal.

Mr. Ouazzani Chahdi said that, in the French text, it was stated that reports by international organizations might enjoy "some authority" (*une certaine autorité*). That formulation made clear that the authority that they might enjoy was relative.

Mr. Nolte (Special Rapporteur) said that, although he could see the merit of the formulation "some authority", the very word "authority" would continue to pose a problem for some Commission members. He was prepared to accept Sir Michael Wood's proposal to replace the words "may enjoy authority in the assessment of" with "may be very important when assessing".

The Chair took it that the Commission wished to delete the words "at the universal level" and to replace the words "may enjoy authority in the assessment of" with "may be very important when assessing".

It was so decided.

Paragraph (14), as amended, was adopted.

The meeting rose at 6 p.m.

Provisional

For participants only

24 September 2018

Original: English

International Law Commission
Seventieth session (second part)

Provisional summary record of the 3446th meeting

Held at the Palais des Nations, Geneva, on Tuesday, 7 August 2018, at 10 a.m.

Contents

Draft report of the Commission on the work of its seventieth session (*continued*)

Chapter IV. Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued)

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*Present:**Chair:*

Mr. Valencia-Ospina

Members:

Mr. Argüello Gómez

Mr. Cissé

Ms. Escobar Hernández

Ms. Galvão Teles

Mr. Hassouna

Mr. Huang

Mr. Jalloh

Mr. Laraba

Ms. Lehto

Mr. Murase

Mr. Murphy

Mr. Nguyen

Mr. Nolte

Ms. Oral

Mr. Ouazzani Chahdi

Mr. Park

Mr. Peter

Mr. Petrič

Mr. Rajput

Mr. Ruda Santolaria

Mr. Saboia

Mr. Šturma

Mr. Tladi

Mr. Vázquez-Bermúdez

Mr. Wako

Sir Michael Wood

Mr. Zagaynov

Secretariat:

Mr. Llewellyn

Secretary to the Commission

The meeting was called to order at 10.05 a.m.

Draft report of the Commission on the work of its seventieth session (continued)

Chapter IV Subsequent agreements and subsequent practice in relation to the interpretation of treaties (continued) (A/CN.4/L.917 and A/CN.4/L.917/Add.1)

The Chair invited the Commission to resume its consideration of the portion of chapter IV of the draft report contained in document A/CN.4/L.917/Add.1.

Commentary to draft conclusion 4 (Definition of subsequent agreement and subsequent practice)

Paragraph (12)

The Chair invited the Committee to resume its consideration of paragraph (12) of the commentary to draft conclusion 4, which had been left in abeyance at the previous meeting.

Mr. Nolte (Special Rapporteur) said that, following consultations with Mr. Murphy and Sir Michael Wood, he wished to propose that, in the first sentence, the word "normally" should be replaced with "necessarily"; that, in the second sentence, the phrase "should, for the sake of clarity, be" should be replaced with the word "is", and the words "single agreement" should be replaced with "common act or undertaking"; that, in the third sentence, the word "usually" should be deleted; that the last sentence should be deleted in its entirety; and that footnote 88, currently appearing at the end of the paragraph, should be moved to the end of the second sentence.

Paragraph (12), as amended, was adopted.

Commentary to draft conclusion 5 (Conduct as subsequent practice) (continued)

Paragraph (15)

Mr. Murphy said that, in the first sentence, the words "in assessing" should be replaced with "when assessing" to echo the change made to the previous paragraph and the language of the draft conclusion itself. More substantively, as the paragraph referred to the mandate of the International Committee of the Red Cross but the quotation cited only the Statutes of the International Red Cross and Red Crescent Movement, it might be more accurate to also mention the statutes of the Committee, which contained exactly the same provision concerning the Committee's role. He therefore proposed that the Statutes of the International Red Cross and Red Crescent Movement should be cited in footnote 159. Then, in the text of paragraph (15), after the indicator for footnote 162, the sentence should be amended to read: "Article 4, paragraph 1 (g), of the Statutes of the International Committee of the Red Cross and article 5, paragraph 2 (g), of the Statutes of the Movement provide that the role of the International Committee is to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof."

Mr. Nolte (Special Rapporteur) said that he could agree to Mr. Murphy's proposals provided that footnote 159 also contained a reference to the general mandate conferred on the Committee by the Geneva Conventions of 1949, which were referenced in footnote 160 but not specifically in relation to the mandate.

Mr. Jalloh, noting that footnotes 162 and 163, as well as others throughout the commentary, contained links to websites, asked whether the Special Rapporteur might consider providing references that were not to websites, as many links became outdated very quickly.

The Chair said that Mr. Jalloh's suggestion would be studied by the Secretariat and the Special Rapporteur to ensure the uniformity of the references.

Paragraph (15), as amended, was adopted.

Paragraph (16)

Mr. Murphy said that, again, in the first sentence, the words "for assessing" should be replaced with "when assessing". In the same sentence, the full title of the initiative should be given — the "Landmine and Cluster Munition Monitor"; the words "a joint initiative" should be replaced with "an initiative"; and the words "and the" between "International Campaign to Ban Landmines" and "Cluster Munitions Coalition" should be replaced with a hyphen, as the two entities had merged. In the second and third sentences, the references to the Dublin Convention should actually be to the Oslo Convention, which was cited in the reference in the footnote.

The Chair said that, given the limited time available, the focus should be on substantive amendments. Minor editorial changes did not need to be discussed in plenary and should be submitted directly to the Secretariat, which would consider them in consultation with the Special Rapporteur and the Rapporteur.

Mr. Nolte (Special Rapporteur) said that, while he understood that the Commission was under serious time pressure, he would like to review proposed amendments to determine if they really were minor before they were submitted to the Secretariat.

The Chair said that the Secretariat would in any case not make any changes without first consulting him.

Mr. Tladi said that proposals for genuinely minor amendments generally did not take up much of the Commission's time because they did not require any discussion. In his view it would set a dangerous precedent to prevent members from raising them in the plenary, but he would not stand in the way of consensus on the matter.

The Chair said that another option would be for those members who had shown a particular interest in the drafting of the commentaries to form a small working group with the Special Rapporteur and Rapporteur to deal with proposed minor amendments.

Mr. Huang said he agreed that it was necessary to speed up the process of adopting the report. It was important to bear in mind that the Commission was supposed to be adopting the commentaries, not debating the topic or discussing amendments as in the Drafting Committee. He proposed that amendments that could not be immediately be agreed upon should be set aside and discussed directly by the members concerned before being referred back to the plenary for adoption.

The Chair said that, of course, as the Commission was dealing with a final text on second reading, it might need to consider issues in more detail than on first reading, but nonetheless it needed to work as swiftly as possible.

Mr. Nolte (Special Rapporteur) said that he supported the approach put forward by the Chair, on the understanding that all proposals would be checked with him and, if he did not agree with them, they would be referred back to the plenary.

Sir Michael Wood said that, as Mr. Murphy seemed to have many proposals to make, it might be more efficient for him and the Special Rapporteur to meet bilaterally to discuss them so that they could be adopted more efficiently in plenary.

Paragraph (16) was adopted.

Paragraph (17)

Sir Michael Wood proposed that the word "evidence" should be replaced with "information" in both instances in the first sentence. In the last sentence, he proposed replacing the words "their assessments" with "their documentation".

Mr. Nolte (Special Rapporteur) said that he agreed with the first proposed change. However, in his view it was not only the documentation of non-State actors that must be critically reviewed, and he would therefore rather amend the last sentence to refer to "their documentation and assessments".

Paragraph (17), as amended, was adopted.

Paragraph (18)

Mr. Rajput said that, in the first sentence, it was indicated that social practice was not relevant for the purposes of draft conclusion 5. However, the rest of the paragraph then referenced jurisprudence which, while helpful and interesting, did not seem relevant in that context. If the Commission started treating social practice as subsequent practice, it would give rise to a whole host of problems. It might be the practice in the European Union or in some regional institutions, but he assumed the Commission's output was to be of universal application and relevance. He therefore proposed deleting the paragraph entirely.

Mr. Nolte (Special Rapporteur) said that the matter had been discussed a number of times, and the text of the paragraph had been carefully considered and negotiated. It did not claim that social practice was relevant in a general sense but pointed out that the European Court of Human Rights had referred to and used it. He would therefore not be in favour of deleting the paragraph.

Mr. Tladi, supported by **Mr. Saboia** and **Mr. Ruda Santolaria**, said that he supported the Special Rapporteur's position not to delete the paragraph. It was clear from the way the paragraph was formulated that social practice in that context was always connected with State practice.

Mr. Park said that he also supported the position of the Special Rapporteur. As paragraphs (18), (19) and (20) were related, the deletion of paragraph (18) would have a knock-on effect on the others.

Mr. Rajput said that, as there did not seem to be much support for his proposal to delete the paragraph, he wished to propose at least amending the second sentence by prefacing it with a reference to "in certain regional contexts".

Mr. Huang said that he fully supported Mr. Rajput's position. While the Commission should respect the decisions of the European Court of Human Rights, it should also remain neutral and avoid becoming involved in social debate on what was a very politically controversial issue. In many countries outside Europe, particularly in Asia, the subject of the case cited was controversial. It was important to respect not only European social practice, but also social practice in other civilizations. He would not object to maintaining the first sentences of the paragraph, but he did not believe the Commission should include references to such cases. He had not been present at the meeting at which the paragraph had been adopted on first reading, and wished to express his strong opposition to it.

Mr. Tladi said that the paragraph was not about the substance of the particular case of *Dudgeon v. the United Kingdom*; that was simply an example of the practice of the European Court in that context. As the reference was to the European Court of Human Rights, it was clear that a particular regional context was being discussed, as the convention being interpreted was a European one and was only applicable to the parties to it. There was no suggestion that the rulings emanating from that Court were somehow globally applicable. The insertion of the language proposed by Mr. Rajput was therefore not necessary.

Ms. Lehto said that she agreed with Mr. Tladi. In several parts of the commentaries reference was made to the European Court of Human Rights, as well as the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, without specifying that the Commission was dealing with a specific regional context, because that was apparent from the names of the courts. She therefore did not see any need for the proposed amendment.

Sir Michael Wood said that a compromise solution might be to retain the first four sentences of the paragraph and delete the remainder, which was simply a description of the substance of the cases and was not essential to the substantive point being made.

Mr. Ouazzani Chahdi said that he would favour keeping the paragraph as originally drafted, as the reasoning was continued in paragraphs (19) and (20), and if parts of paragraph (18) were deleted then the other paragraphs would also have to be deleted. The conclusion noted in paragraph (20) should serve to assuage concerns.

Mr. Nolte (Special Rapporteur) said that paragraph (18) had been formulated in full respect of all civilizations, which was precisely why it was concluded in paragraph (20) that social practice, as such, was not sufficient to constitute relevant subsequent practice of parties, although it had occasionally been recognized by the European Court of Human Rights as contributing to the assessment of State practice. It was thus clear that it was a development that had taken place in Europe. If Mr. Rajput's proposed amendment to include a reference to "certain regional contexts" was accepted, it would suggest that such developments were also taking place in other regional contexts, which was not necessarily the case. The proposal by Sir Michael Wood was not, in his view, a compromise, as the portion of the paragraph he proposed to delete was more than just a description of the cases.

Mr. Rajput said that he was not convinced by the arguments of Ms. Lehto or the Special Rapporteur against his proposed amendment. The paragraph did not contain just an ordinary reference to a regional court; it contained a reference to a regional court in relation to certain social practices. If the regional context was already obvious or implicit, he did not see any problem in making it explicit; on the contrary, it was necessary to highlight the point. Moreover, the jurisprudence cited raised more questions than it answered, and he would like to hear the Special Rapporteur's views on the cases mentioned. In the third sentence, for example, it was stated that the invocation of social changes or social acceptance had ultimately remained linked to the practice of States parties: what was the depth of that link? The statement in the fifth sentence concerning the great majority of the member States of the Council of Europe called the whole drafting exercise into question, as it seemed to imply that a "great majority" was sufficient evidence of subsequent practice. In the last sentence, in which *Christine Goodwin v. the United Kingdom* was referenced, was it being suggested that "uncontested evidence of a continuing international trend" amounted to subsequent practice? The Commission risked damaging the entire drafting exercise simply because of a wish to cite particular cases. He could go along with Sir Michael Wood's proposal to retain only the first four sentences of the paragraph, as it would remove the problematic elements.

Ms. Escobar Hernández said that she supported retaining the original version of the paragraph, which clearly identified the practice referred to as being the practice of the European Court of Human Rights.

Mr. Saboia said that he also supported retaining the paragraph. The Inter-American Court of Human Rights had taken the same position as the European Court of Human Rights in respect of social practice.

Mr. Jalloh said that, since the commentary contained references to a number of regional courts, including the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights, there was no need to debate the inclusion of a specific reference to one particular region. Paragraph (18) did not contain a pronouncement on the substance of the cases mentioned. It was reasonable for members to contest the Special Rapporteur's reasoning, but not for them to object to the subject matter of cases cited in the commentaries. He favoured retaining the paragraph as it was.

Mr. Nolte (Special Rapporteur) said that respect for civilizations was a two-way street. In United Nations documents, it ought to be possible to cite examples of practices from the European region alongside examples of existing practices from other regions. If necessary, a reference to a recent judgment of the Inter-American Court of Human Rights could be added to the paragraph.

The Chair said it appeared that a majority of members supported the Special Rapporteur's position; he therefore took it that paragraph (18) should be retained without amendments.

Paragraph (18) was adopted.

Paragraphs (19) and (20)

Mr. Murphy said that the word "Gypsy" was inappropriate and should be deleted from paragraph (19).

Mr. Tladi said that since the last sentence of paragraph (20) did not seem to constitute a conclusion to the whole commentary, it should be moved to become the last sentence of paragraph (19).

Mr. Nolte (Special Rapporteur) said that paragraph (20) summarized the point that, in Europe, social practice had occasionally been recognized as relevant. Moving the last sentence of paragraph (20) to paragraph (19) would make the conclusion sound more absolute than it was. He would prefer not to move the sentence, since doing so would detract from the clarity of the message being conveyed. It was a question of emphasis, and in the paragraph as it stood, the emphasis was more logical and more appropriate.

Mr. Tladi, supported by **Mr. Rajput**, said that the sentence in question constituted an appropriate conclusion to the discussion of the situation in Europe, but not to the discussion of the role of social practice as a whole.

Mr. Zagaynov, supported by **Sir Michael Wood**, said that he agreed with the Special Rapporteur's position.

The Chair said that, since the members in favour of moving the sentence appeared to be in a minority, that proposal would not be taken up.

Paragraphs (19) and (20), as amended by Mr. Murphy, were adopted.

The commentary to draft conclusion 5 as a whole, as amended, was adopted.

Part Three (General aspects)

Commentary to draft conclusion 6 (Identification of subsequent agreements and subsequent practice)

Paragraph (1)

Mr. Rajput said that, in paragraph (1), the word "that" should be replaced with "the ways in which".

Sir Michael Wood said that it would be preferable to replace "that" with "how" and to replace the word "must" with "are to be".

Paragraph (1), as amended, was adopted.

Paragraphs (2) to (11)

Paragraphs (2) to (11) were adopted.

Paragraph (12)

Mr. Tladi said that, in the second sentence of paragraph (12), the case being referred to and the States in question should be identified by name.

Mr. Nolte (Special Rapporteur) said that he agreed: the beginning of the sentence would be amended to read "On the one hand, in the *Kasikili Sedudu Island* case, the Court did not consider the 'joint ministerial communiqués' of Namibia and Botswana ...".

Sir Michael Wood said that footnote 197 ought to be amended so that the *Kasikili Sedudu Island* case appeared first.

Paragraph (12), as amended, was adopted.

Paragraph (13)

Paragraph (13) was adopted.

Paragraph (14)

Mr. Murphy said that, in the first sentence of paragraph (14), the word "fact" should be replaced with "likelihood". In the second sentence, the words "was undertaken"

should be replaced with "establishes an agreement", which would better represent the content of article 31 (3) (b) of the 1969 Vienna Convention on the Law of Treaties.

Mr. Nolte (Special Rapporteur) said that in the first sentence, the word "fact" was not an established fact, as reflected in the use of "may".

The Chair said that he took it that the members wished to take up only the second of Mr. Murphy's proposals.

It was so decided.

Paragraph (14), as amended, was adopted.

Paragraph (15)

Paragraph (15) was adopted.

Paragraph (16)

Mr. Murphy said that the first sentence of paragraph (16) gave the impression that prisoners of war could choose whether or not to be repatriated, which was not what State practice showed to be the case. The words "the State practice of respecting" should be replaced with "States have accepted that there be an inquiry as to". In the same sentence, the phrase "is limited to" should be replaced with "in", since the quote in the second sentence made no reference to cases not involving the International Committee of the Red Cross.

Mr. Nolte (Special Rapporteur) said that he could accept those two proposals.

Paragraph (16), as amended, was adopted.

Paragraphs (17) to (21)

Paragraphs (17) to (21) were adopted.

Paragraph (22)

Mr. Murphy said that, in the third sentence of paragraph (22), the words "attributable to" should be replaced with "authorized by".

Mr. Nolte (Special Rapporteur) said that that formulation would probably be too restrictive.

Ms. Lehto said that it would be better to replace "attributable to" with "on behalf of".

Mr. Nolte (Special Rapporteur) said that he preferred Ms. Lehto's proposal.

Paragraph (22), as amended, was adopted.

Paragraphs (23) and (24)

Paragraphs (23) and (24) were adopted.

Paragraph (25)

Mr. Murphy proposed inserting, after the words "An example of a practical arrangement", in the first sentence, the phrase "involving fewer than all of the parties to a treaty". In the last sentence, he said that it was not clear why there was a reference to article 31 of the 1969 Vienna Convention when paragraphs (24) and (25) referred exclusively to the "identification of subsequent practice under article 32", according to the heading that preceded them. He would therefore suggest replacing the reference to article 31 (3) (a) or (b) with one to article 32. He further suggested that the last part of the last sentence, starting with the words "that is subject to challenge" should be deleted, as it was not supported by the first part of the sentence.

Mr. Nolte (Special Rapporteur) said that he agreed with Mr. Murphy's proposed addition in the first sentence. He further agreed that there should be a reference to article 32

in the last sentence, although he was loath to remove the reference to article 31. The last sentence of the paragraph referred to the fact that in the case of the North American Free Trade Agreement (NAFTA), and many other similar agreements, it was ultimately the judicial or quasi-judicial system in existence that decided whether part of an agreement had any value or constituted a practical arrangement or a subsequent practice. The sentence signalled that a third party could challenge such an agreement; although he found it to be a useful point, he would not insist on maintaining it.

Sir Michael Wood said that the reference to article 31 should not simply be replaced with a reference to article 32, since the intention of the last sentence was precisely to convey that it was clear from the circumstances that the memorandum of understanding did not claim to constitute an agreement regarding the interpretation of NAFTA under article 31. Either the reference to article 31 (3) (a) or (b) should be deleted or it should remain together with a reference to article 32. He supported the deletion of the last part of the last sentence, since the practical arrangement could not plausibly be challenged by a judicial institution; alternatively, it should be redrafted to read "that is subject to challenge by other parties, including through a judicial or quasi-judicial institution".

Mr. Murphy said that he would not be opposed to maintaining the reference to article 32, alongside the current reference to article 31 (3) (a) or (b), although it might look odd, given that the point of the paragraph related specifically to article 32, and not to article 31. He felt strongly that the last part of the last sentence should be deleted, as there was no authority for the proposition that a practical arrangement that did not speak to the rights and obligations of a NAFTA party could be challenged before a NAFTA dispute resolution tribunal.

Mr. Nolte (Special Rapporteur) said that, in the interest of time, he would agree to the insertion, in the last sentence, of a reference to article 32, alongside that to "article 31 (3) (a) or (b)"; to the deletion, in the last sentence, of the phrase starting with "that is subject to challenge"; and to the previously agreed insertion of additional language in the first sentence.

Paragraph (25), as amended, was adopted.

Commentary to draft conclusion 7 (Possible effects of subsequent agreements and subsequent practice in interpretation)

Paragraph (1)

Paragraph (1) was adopted.

Paragraph (2)

Mr. Murphy proposed that, in the second sentence, the phrase "possible meanings" should be changed to "a possible meaning". He further proposed replacing, in the penultimate sentence, the words "wider interpretation" with "wider meaning", which he said would present a better contrast with the previous sentence, and deleting the last sentence of the paragraph, as it seemed superfluous and, with regard to the phrase "a range of possible interpretations", potentially confusing. He would not be opposed to maintaining the text in parentheses at the end of the paragraph so that it came immediately after the second sentence.

Mr. Nolte (Special Rapporteur), noting that paragraph (2) had been adopted on first reading without comment, said that the last sentence was an allusion to paragraph 1 of draft conclusion 7, specifically the phrase "otherwise determining the range of possible interpretations", as when a treaty accorded some scope for the exercise of discretion. Regarding the second sentence, when an interpreter began its interpretation, there might be different possible meanings, which should be specified or narrowed down to the true interpretation or meaning; therefore the plural form was justified. The formulation "wider interpretation" was preferable to the proposed amendment "wider meaning", as it better reflected the language used in draft conclusion 7. In sum, although the amendments proposed by Mr. Murphy appeared minor, they substantively changed the text in ways with

which he did not agree. He would therefore prefer to maintain the paragraph as originally drafted.

Paragraph (2) was adopted.

Paragraph (3)

Mr. Rajput said that in order to clarify, in the third sentence, that subsequent agreements and subsequent practice were but one of the means of shedding light on the special meaning of a term in the sense of article 31 (4) of the 1969 Vienna Convention, he proposed adding, after the phrase "article 31, paragraph 4," the phrase "in addition to other means of interpretation".

Mr. Nolte (Special Rapporteur) said that the addition proposed by Mr. Rajput was one that could apply to many paragraphs of the commentary to the draft conclusions. However, the word "may" in the phrase "may shed light" should provide the necessary assurance that subsequent agreements and subsequent practice were but one means of interpretation. Mr. Rajput's point was already amply clear in the context of the phrase and commentary as a whole.

Mr. Rajput said that he did not agree with the Special Rapporteur. According to the current structure of the paragraph, the determination of the ordinary meaning was the first step taken by international courts and tribunals, and subsequent agreements and subsequent practice came into play only at a much later stage. And yet the third sentence, as it currently stood, gave the impression that the determination of the ordinary meaning could be displaced to a later stage.

Mr. Nolte (Special Rapporteur) proposed that, in order to address Mr. Rajput's concern, the word "also" should be inserted between the words "may" and "shed light".

Paragraph (3), as amended, was adopted.

Paragraph (4)

Sir Michael Wood said that he would like to know whether the first instance of the word "of" in the expression "a narrow interpretation of different possible shades of meaning" was a typographical error, and should instead read "or".

Mr. Nolte (Special Rapporteur) said that while it was not an error, the phrase might read better if the word "of" was replaced with "among".

Mr. Rajput proposed that the expression "confirming a narrow interpretation of different possible shades of meaning" should be replaced with "adopting a narrow interpretation over different possible shades of meaning".

Mr. Nolte (Special Rapporteur) said that he failed to see why the word "adopting" should be used in place of "confirming"; the former was usually used to describe more formal processes, for example in a court case. Moreover, the verb "confirm" was that used in the language of interpretation, for example, in article 32 of the 1969 Vienna Convention on the Law of Treaties. He would therefore prefer to retain the verb "confirming".

The Chair said he took it that the Commission wished to adopt the paragraph with the word "among" replacing "of" in the expression "a narrow interpretation of different possible shades of meaning".

Paragraph (4), as amended, was adopted.

Paragraph 5

Mr. Murphy proposed replacing, in the first sentence, the word "specifying" with the word "limiting" and the phrase "just one of different possible meanings" with "just one narrow meaning". Such changes would present a clear contrast with the content of paragraph (4) and would also be a smooth lead-in to what followed in paragraph (5).

Mr. Nolte (Special Rapporteur) said that he wished to reiterate his argument against Mr. Murphy's proposal to singularize "meanings" in paragraph (2). In the light of the fact

that draft conclusion 7 referred to a range of interpretations, he preferred to adopt a consistent approach in the commentary and to maintain the plural "meanings". He also preferred the word "specifying", in line with the wording used in paragraph (2), to Mr. Murphy's proposed "limiting".

Sir Michael Wood said that he supported the replacement of the word "specifying" with the word "limiting", since the meaning could be "limited to", but not "specified to", one of several possible meanings.

Paragraph (5) was adopted with that amendment.

Paragraphs (6) and (7)

Paragraphs (6) and (7) were adopted.

Paragraph (8)

Mr. Rajput said that he had reservations about the second sentence of the paragraph, especially regarding the references provided in the footnote relating to it. Most of the cases cited in footnote 246 referred to interpretations of Security Council resolutions, not treaties, which was a completely different context. The cases in question did not, moreover, clearly state that subsequent agreements and subsequent practice could contribute to a clarification of the object and purpose of a treaty — a statement made in the second sentence of paragraph (8), and which might unnecessarily tie the hands of future interpreters. He therefore proposed that the second sentence should be deleted.

Mr. Nolte (Special Rapporteur) said that he disagreed: the second sentence of the paragraph in no way tied the hands of future interpreters. It was simply an explanation of what had been said from the beginning — that all possible means of interpretation, in their interaction with other means, must be taken into account. The sentence did not go beyond such notions. Moreover, the cases considered by the International Court of Justice that were cited in footnote 246 were not limited to the interpretation of Security Council resolutions, but involved interpretation of the Charter of the United Nations too. He would prefer to keep the sentence as originally drafted.

Mr. Rajput said that the paragraph made the very specific claim that subsequent agreements and subsequent practice could also contribute to the determination of the object and purpose of a treaty. He strongly disagreed with that statement, but would defer to the Special Rapporteur's preferences.

Paragraph (8) was adopted.

Paragraph (9)

Paragraph (9) was adopted.

Paragraph (10)

Mr. Murphy proposed deleting the phrase "other than in judicial or quasi-judicial contexts" because State practice could also arise in the context of pleading before a court or another venue. He also proposed replacing the word "acceptable" in the phrase "a wider range of acceptable interpretations" with the word "possible".

Mr. Nolte (Special Rapporteur) said that, in a spirit of cooperation, he would agree to the amendments proposed by Mr. Murphy.

Paragraph (10), as amended, was adopted.

Paragraphs (11) to (15)

Paragraphs (11) to (15) were adopted.

Paragraph (16)

Mr. Tladi said that the judgment of the International Court of Justice in the *Kasikili Sedudu Island* case was inaccurately reflected. In the last sentence, it was claimed that the Court had acknowledged a certain subsequent practice in the context of article 32 of the 1969 Vienna Convention on the Law of Treaties. Yet, in the paragraphs of the judgment cited in the footnotes, the Court had made no mention of that article or of supplementary means of interpretation. In paragraph 52 of its judgment, the Court had stated that it would "examine each of these three sets of documents in turn, in order to determine what conclusions may be drawn from them in the light of the rules set out in Article 31, paragraph 3, of the Vienna Convention". The first paragraph of the judgment referred to in footnote 269 was paragraph 55, in which the Court had asserted that it "shares the view that the Eason Report and its surrounding circumstances cannot be regarded as representing 'subsequent practice in the application of the treaty' of 1890, within the meaning of Article 31, paragraph 3 (b), of the Vienna Convention". In other words, the paragraph did not concern supplementary means of interpretation. The next paragraph to be cited was paragraph 80, in which the Court had again not said anything about article 32 or supplementary means of interpretation. What it had said was that it "finds that these facts, while not constituting subsequent practice by the parties in the interpretation of the 1890 Treaty, nevertheless support the conclusions which it has reached by interpreting Article III, paragraph 2, of the 1890 Treaty in accordance with the ordinary meaning to be given to its terms". Although neither article 32 nor supplementary means of interpretation had been mentioned anywhere in that part of the Court's judgment, paragraph (16), as currently worded, gave the impression that they had. Consequently, his proposal was to delete the last two sentences of the paragraph.

Mr. Nolte (Special Rapporteur) said that the point being made in the paragraph was that, in the *Kasikili Sedudu Island* case, the Court had used conduct by one of the States parties to confirm a particular interpretation. While, admittedly, the Court had not referred explicitly to article 32, it had acted in accordance with it, so invoking the article in paragraph (16) was justifiable. He would be willing, however, to delete the words "(under article 32)" from the end of the last sentence.

Mr. Murphy said that he was sympathetic to the concerns raised by Mr. Tladi. In the paragraphs of the Court's judgment that were cited, the Court had not referred to article 32 or to supplementary means of interpretation, which meant that, in the last sentence of paragraph (16), the Commission was making an assumption about the Court's deliberations. One solution might be to replace the words "thereby reconciled" with "might be regarded as reconciling".

Mr. Tladi said that Mr. Murphy's proposal would be acceptable, provided that the reference to paragraph 55 of the Court's judgment was removed from footnote 269. The paragraph sat squarely within the Court's assessment of subsequent practice within the meaning of article 31 (3) of the 1969 Vienna Convention.

Sir Michael Wood said that he found Mr. Tladi's explanation of the issues with paragraph (16) convincing. His preference would be to delete the words "for example" from the second sentence, as they were a direct reference to article 32, and to end the last sentence after the words "by only one of the parties". He supported the removal of the reference to paragraph 55 of the Court's judgment from footnote 269.

Mr. Nolte (Special Rapporteur) said that he could accept the amendments proposed by Mr. Murphy, Mr. Tladi and Sir Michael Wood.

Paragraph (16), as amended, was adopted.

Paragraphs (17) and (18)

Paragraphs (17) and (18) were adopted.

Paragraph (19)

Mr. Rajput said that the claim made in the paragraph appeared to be that, by referring to decisions from other jurisdictions, domestic courts contributed indirectly to

subsequent practice by serving as a supplementary means of interpretation within the meaning of article 32 of the 1969 Vienna Convention. In draft conclusion 5 (2), however, the Commission asserted that "other conduct" did not constitute subsequent practice, but might be relevant when assessing the subsequent practice of parties to a treaty. By treating the practice of a judicial organ as a supplementary means of interpretation under article 32, the Commission was creating a discrepancy. He did not think that domestic courts referred to one another's decisions with the objective of contributing to subsequent practice, and he would prefer to see paragraph (19) deleted.

Mr. Nolte (Special Rapporteur) said that the judgments of domestic courts were, by definition, State practice, and thus did not fall under the umbrella of "other conduct". Court decisions were one of the ways in which States spoke, and it was made clear in draft conclusion 5 that one of the functions of a State was its judicial function. If all the courts of States that were parties to a particular treaty engaged in the same interpretation of a particular provision, their conduct would obviously contribute to subsequent practice in the application of the treaty. With that in mind, he did not agree with Mr. Rajput's proposal.

Mr. Murphy said that he understood the desire to point to the possibility of looking at the decisions of foreign courts as a supplementary means of interpretation under article 32. Having said that, he would delete the third sentence, which came out of nowhere and was, in his view, incorrect, as the decisions of any court could be used pursuant to article 32. There was no right or wrong way of referring to the decisions of foreign courts. The importance of adopting a discriminating approach was captured by the quote from Lord Hope, although he was clearly also saying that one could be selective, by looking at courts of high standing, for example.

Sir Michael Wood said that he was in favour of deleting the third sentence.

Mr. Nolte (Special Rapporteur) said that the judgment of a foreign court concerning the application of a treaty constituted subsequent practice and, depending on whether it established the agreement of all parties to the treaty, had to or could be taken into account. In accordance with draft conclusion 2 (5), the various means of interpretation had to be dealt with appropriately. He could agree to the deletion of the third sentence, but would insist on keeping the quote from Lord Hope, which illustrated the point being made in paragraph (19) very well.

Mr. Rajput said that the paragraph did not deal specifically with the interpretation of a treaty by domestic courts. Instead, it addressed the conduct of domestic courts in a broader context and thus did not feed directly into subsequent practice within the meaning of draft conclusion 5 (1). While such conduct was a supplementary means of interpretation, attempting to link it to article 32 of the 1969 Vienna Convention was problematic. If the Special Rapporteur insisted on retaining the paragraph, a compromise solution might be to replace the words "may be thin" in the third sentence with "should be approached cautiously".

Mr. Murphy said that he did not agree with the compromise solution proposed by Mr. Rajput. The reference to "an appropriate use" in the third sentence did not follow from what came before, and, in any event, the paragraph dealt with subsequent practice under article 32 of the 1969 Vienna Convention. In that context, there was nothing wrong with looking at the judicial decisions of a handful of parties.

Sir Michael Wood said that, by referring to "selective invocation" in the third sentence, the Commission was delving deep into national legal systems. Ultimately, what mattered was that courts came to the right conclusions.

Mr. Nolte (Special Rapporteur) said that there was some background to the point made in the third sentence. In a famous dissenting opinion, Associate Justice Antonin Scalia of the Supreme Court of the United States had argued that, when taking into account the judgments of foreign courts, one should not discriminate among equals. Nevertheless, he was willing to delete the third sentence, provided that the content of footnote 278 was incorporated in footnote 279.

Paragraph (19), as amended, was adopted on that understanding.

Paragraph (20)

Mr. Murphy said that the paragraph was unnecessary and inappropriate. The Commission was not talking about article 31 (3) (a) and (b) of the 1969 Vienna Convention. If it were, one could caution against selective invocation. As it was, however, the Commission was trying to say something about article 32, under which selective invocation was perfectly acceptable. Most of the cases cited in footnote 280 had less to do with article 32 and more to do with looking at other courts' decisions as a subsidiary means of interpretation. The Commission was thereby merging two different concepts, and should not, in his view, be claiming that selective invocation was to be avoided. He would therefore delete at least the first part of the paragraph. Furthermore, the source cited in footnote 281 did not substantiate the observation to which it related, as it contained no mention whatsoever of divergent practice.

Sir Michael Wood said that he would prefer to delete the paragraph altogether, as there was simply no justification for the rather bold statements made in it. In any event, footnote 280 should be checked, as it appeared to contain unjustified criticisms of a series of judgments issued by English and Australian courts.

Mr. Nolte (Special Rapporteur) said that he did not feel that the statements made in paragraph (20) were bold at all. He could not exclude that there was a misquotation in footnote 281, but would need to verify if that was the case. He therefore proposed that the paragraph should be left in abeyance. It was worth recalling, incidentally, that the document before the Commission was not a first draft.

The Chair said that the paragraph would be left in abeyance, which would give the Secretariat and members of the Commission time to check the sources cited in footnotes 280, 281 and 282.

It was so decided.

The meeting rose at 12.55 p.m.